Supreme Court, U.S.
FILED

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03-346 AUG 27 2003

In The
Supreme Court of the United States

STATE OF LOUISIANA, through the
DEPARTMENT OF TRANSPORTATION
and DEVELOPMENT,

Petitioner,

vs.

GORDEAN ADELLA WINGFIELD, ET ALS.,

Respondents.

On Petition For Writ Of Certiorari To The First Circuit Court Of Appeal Of Louisiana

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. (A) May a state court ignore the federal zero tolerance drug policy for commercial truck drivers embodied in 49 U.S.C.A. §§ 31136 and 31306 and 49 C.F.R. § 382.101, *et seq.*, by preventing a jury from hearing that the urine of a driver hauling a double-decked cattle trailer, involved in a single vehicle fatal accident on an interstate highway, tested positive for marijuana?

   (B) Is it necessary to prove driver impairment once it has been established that a urine test proved positive for marijuana use or is the simple presence of the marijuana enough to establish a need for the evidence to go to a jury?

2. Does the Federal Aid Highway Act (FAHA) codified in 23 U.S.C.A. § 101, *et seq.*, preempt state tort law regarding the design, construction, maintenance, and signage of the Dwight D. Eisenhower National System of Interstate and Defense Highways?

LIST OF ALL PARTIES WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

1. State of Louisiana, through the Department of Transportation and Development, ("DOTD").
2. National Union Fire Insurance Company of Pittsburgh, PA.
3. Gordean Adella Wingfield, individually and as guardian and conservator of the estate of her major son, Kenny Clark ("Clark").
4. Saratina Wingfield.
5. Jason Wingfield.
6. Joshua Wingfield.
7. Jackie Murray.
8. Sharon Royner.
9. Ivy J. Willis, as legal guardian and attorney for Joseph Edward Wingfield.
10. Joseph Edward Wingfield.

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2. *Wingfield v. State ex rel. Dept. of Transp. and Development*, 2003-0339 (La. 5/30/03); 845 So.2d 1060.
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4. *Wingfield v. State ex rel. Dept. of Transp. and Development*, 2001-2668 (La. App. 1 Cir. 11/8/02), 835 So.2d 785.
5. *Wingfield v. State ex rel. Dept. of Transp. & Development*, 2001-0334 (La. 2/6/01); 784 So.2d 650.
6. *Wingfield v. State ex rel. Dept. of Transp. & Development*, 2001-0335 (La. 2/6/01); 784 So.2d 651.
7. *Wingfield v. State ex rel. DOTD*, 2000-0133 (La. 3/17/00); 756 So.2d 1146.
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1. *Wingfield v. State ex rel. Dept. of Transp. & Development*, 2001 CW 01228 (La. App. 1st Cir. 1/31/01)
2. *Wingfield v. State ex rel. Dept. of Transp. & Development*, 2000 CW 2568 (La. App. 1st Cir. 1/31/01)
3. *Wingfield v. State ex rel. Dept. of Transp. & Development*, 2000 CW 2568 (La. App. 1st Cir. 11/26/00)
4. *Wingfield v. State ex rel. Dept. of Transp. & Development*, 00 CW 1917 (La. App. 1st Cir. 10/23/00)

5. *Wingfield v. State ex rel. Dept. of Transp. & Development*, 99 CW 2831 (La. App. 1st Cir. 12/16/99)

STATEMENT OF BASIS FOR SUPREME COURT JURISDICTION

On November 8, 2002, the Louisiana Court of Appeal for the First Circuit ("CA") rendered its opinion (App. 1-45). On November 21, 2002, the State of Louisiana, through the Department of Transportation and Development ("DOTD"), timely filed an Application for Rehearing En Banc in the CA. On December 31, 2002, the CA filed an order denying that Application. (App. 74.)

On January 31, 2003, DOTD timely filed an application for a writ of certiorari and/or review with the Louisiana Supreme Court ("LSC"), the court of last resort in the state. On May 30, 2003, the LSC entered an order denying the writ application and refused to exercise its supervisory jurisdiction. (App. 75-76).

The present petition is timely filed under 28 U.S.C.A. § 2101 and under Rule 13.1 of this Court. This Court has jurisdiction under 28 U.S.C.A. § 1257.

STATUTES AND REGULATIONS RELIED UPON

UNITED STATES CONSTITUTION

U.S.C.A. Const. Art. VI, cl. 2

UNITED STATES CODE (STATUTES)

23 U.S.C.A. § 101; 23 U.S.C.A. § 103; 23 U.S.C.A. § 106; 23 U.S.C.A. § 109; 23 U.S.C.A. § 114; 23 U.S.C.A. § 116; 49 U.S.C.A. § 31136; 49 U.S.C.A. § 31306; 49 U.S.C.A. § 31310

CODE OF FEDERAL REGULATIONS

49 C.F.R. § 382.101; 49 C.F.R. § 382.103; 49 C.F.R. § 382.107; 49 C.F.R. § 382.109; 49 C.F.R. § 382.205; 49 C.F.R. § 382.213; 49 C.F.R. § 382.215; 49 C.F.R. § 382.303; 49 C.F.R. § 382.501; 49 C.F.R. § 391.11; 49 C.F.R. § 391.15; 49 C.F.R. § 391.41

STATEMENT OF THE CASE

On Saturday, August 6, 1994, at approximately 5:55 a.m., Kenny Clark, a truck driver holding an Arizona six month permit for a commercial driver's license ("CDL"), was driving an 18-wheel rig with a double-deck cattle trailer loaded with 80 head of cattle westbound on Interstate 10 ("I-10") in Baton Rouge, Louisiana. His father-in-law, Jack Ray Wingfield ("JRW"), a CDL holder, was asleep in the sleeper berth. Clark was driving in violation of his Arizona permit.

As Clark approached the I-10 Mississippi River bridge, there were numerous signs and warnings in place to advise him of the upcoming change in alignment of the roadway and necessary decrease in speed. There is no question but that Clark could see and read these signs at least 700 feet in advance of the curve. Clark was driving in excess of the posted speed which, along with his improper braking and steering, caused the tractor-trailer to jack-knife. The tractor-trailer hit the bridge rail, rolled over the 21-inch high concrete railing and fell onto the I-110 southbound below.

JRW suffered massive injuries to which he succumbed three hours later at Baton Rouge General Medical Center ("BRG"). Clark suffered severe head injuries which have left him in a permanent unresponsive state similar to a vegetative state.

Pursuant to standard hospital post-accident testing procedures for an accident involving serious injury or death, Clark's urine was tested for alcohol and drugs. A Syva EMIT test at BRG recorded positive for marijuana, which the hospital confirmed in a test done at Dynacare Laboratories. A separate drug test was performed by the Louisiana State Police Crime Lab and was positive for marijuana. This test result was confirmed by the lab for the presence of marijuana in Clark's urine. There is no dispute as to the fact that Clark tested positive for marijuana following the accident.

I-10 is part of the Dwight D. Eisenhower National System of Interstate and Defense Highways. This system was authorized for construction by federal legislation enacted by Congress in 1955-56. The design, construction, and signage of I-10, including the I-10 east bridge approach ramp where this accident happened, was approved by the Bureau of Public Roads (currently the Federal Highway Administration (FHWA)). The location, design, roadway features, and the traffic signs in place on the date of the accident were all approved by the FHWA. The design and construction of the interstate system ("IS") was 90% funded by the federal government.

Gordean Wingfield, widow of JRW, individually and on behalf of Clark and the surviving children of JRW, filed suit against DOTD claiming that there was a defect in I-10 because it was improperly designed and constructed and

that the signs in place on I-10 at the site of the accident were insufficient to warn motorists of the alleged defects.

DOTD has urged the Louisiana courts almost from the beginning of these proceedings that the doctrine of federal preemption should apply. On July 12, 2000, DOTD filed a Motion for Summary Judgment on Federal Preemption of Louisiana Tort Law in the trial court (App. 173-178), which was denied on July 28, 2000. (App. 46-48.)

DOTD filed an Application for Supervisory Relief with the CA to review the trial court's ruling on the federal preemption issue. On January 31, 2001, the CA denied the writ application (App. 58-59). On February 5, 2001, DOTD filed a writ application with the LSC (App. 179-183) which was denied on February 6, 2001. (App. 63.)

On December 11, 12, and 13, 2000, a *Daubert*[1] hearing was held in the trial court regarding plaintiffs' Joint Motion *In Limine* to Exclude Expert Testimony of Thomas Kurt, M.D., and Gary Wimbish, Ph.D., and All Evidence Regarding Marijuana. On December 21, 2000, final arguments were heard on the *Daubert* motion and three other motions: 1) Plaintiffs' Joint Motion for Partial Summary Judgment as to DOTD's Affirmative Defense of Comparative Negligence of Driving Under the Influence of Marijuana; 2) DOTD's Motion for Summary Judgment on the Issue of the Breach of Duty of Kenny Clark; and 3) DOTD's Motion *In Limine* on Drug Testing Procedure Used on Kenny Clark's sample (App. 49-52).

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[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

DOTD raised the federal question regarding the federal government's policy on use of controlled dangerous substances as contained in the Federal Omnibus Transportation Employee Testing Act of 1991 ("FOTETA") and accompanying federal regulations in support of DOTD's Motion for Summary Judgment (App. 149-156) and in opposition memoranda to plaintiffs' motion *in limine* to exclude all marijuana evidence and its use by Kenny Clark (App. 157-172). The trial court granted plaintiffs' motion *in limine* and Motion for Summary Judgment excluding all evidence of marijuana at the trial on the merits despite the zero tolerance approach against drug use by commercial drivers established by the federal government (App. 49-52).

DOTD filed an application for Supervisory Relief with the CA to review the trial court's exclusion of all marijuana evidence at trial on the merits. On January 31, 2001, the CA declined to exercise its supervisory jurisdiction on this issue (App. 60-61). On February 5, 2001, DOTD filed a writ application with the LSC assigning as error the trial court's exclusion of all marijuana evidence. (App. 184-194.) On February 6, 2001, the LSC denied DOTD's writ application. (App. 62.)

A jury trial was held February 5-21, 2001. The jury rendered a verdict finding that the portion of I-10 where the accident occurred had a defect which created an unreasonable risk of harm, that DOTD had notice of the defect and failed to repair it, that the defect caused the accident, and that Kenny Clark was also negligent in the cause of the accident. The jury apportioned 54% of fault to DOTD and 46% to Kenny Clark and awarded a total of $13,936,284 to the plaintiffs. The damages awarded to Clark and Mrs. Wingfield based on Clark's injuries were

reduced by Clark's 46% of fault. The awards based on JRW's injuries and death were not reduced (App. 64-69).

DOTD filed a timely appeal with the CA. DOTD assigned as error the trial court's ruling that federal law does not preempt state tort law regarding the design, construction, maintenance, and signage on the Interstate System. DOTD also assigned as error the trial court's exclusion of all evidence of marijuana use as violative of the preemptive provisions of the federal motor carrier safety laws (App. 195-200).

On November 8, 2002, the CA rendered its opinion affirming the trial court's denial of DOTD's Motion for Summary Judgment on federal preemption of state tort law. The CA held that "the FAHA [Federal-Aid Highway Act] standards do not attempt to supersede the prohibition in our state law against negligent acts of design, construction, or signage or imposition of strict liability. Nothing in the FAHA provided an alternative to our tort law or required the state to build an unreasonably dangerous and defective highway." (App. 6). The CA overruled the trial court's order granting plaintiffs' motion *in limine* on the marijuana issue. The CA also reversed the trial court's grant of plaintiffs' Motion for Summary Judgment on DOTD's affirmative defense of impairment due to marijuana use. The CA ruled that the majority of the evidence regarding marijuana use should have been presented to the jury. However, the CA found that the exclusion of the marijuana evidence was harmless error and its admission would not have changed the jury's verdict. The CA did not address any of the federal regulations raised by DOTD (App. 7-17) and its opinion frustrates the purpose of the federal legislation.

The CA did reduce Clark's general damage award from $5,000,000 to $3,000,000, Mrs. Wingfield's wrongful death award for JRW from $1,000,000 to $500,000, and her loss of consortium award for injuries to Clark from $500,000 to $200,000, and reinstated JRW's survival action award at $800,000 which the trial court had reduced by a motion for JNOV. (App. 30-38). The net judgment value of the case, excluding interest, is now $6,865,064.30.

On November 21, 2002, DOTD filed an Application for Rehearing with CA asking the court to reconsider its ruling on the federal preemption issue "because the court's ruling does not promote and, in fact, stands as an obstacle to the zero tolerance approach adopted by the federal and state governments regarding commercial drivers and their use of controlled dangerous substances such as marijuana." (App. 201-203.) The CA denied the rehearing (App. 74).

On January 31, 2003, DOTD again filed a writ application with the LSC. DOTD assigned as error the CA's ruling on federal preemption and on its failure to give the proper weight to the federal prohibition of the use of controlled dangerous substances by commercial drivers (App. 204-209). On May 30, 2003, the LSC denied DOTD's writ application by a vote of 4 to 3 (App. 75-76).

ARGUMENT – LAW ON PREEMPTION

"The Supremacy Clause of the United States Constitution, Article IV, Cl. 2, lies at the heart of this case." *Medical Soc. of State of N.Y. v. Cuomo,* 777 F.Supp. 1157 (S.D.N.Y.,1991), affirmed 976 F.2d 812.

"The Supreme Court has observed that there are three ways in which Congress manifests an intent to preempt

state law." *Cuomo, supra*, citing *Schneidewind v. ANR Pipeline*, 485 U.S. 293, 300, 108 S.Ct. 1145, 1151, 99 L.Ed.2d 316 (1988); *California Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 280, 107 S.Ct. 683, 689, 93 L.Ed.2d 613 (1987).

> 1. "The first, 'express preemption,' occurs when Congress declares its intention to preempt state law by so stating." *Cuomo, supra*, citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977).
>
> 2. "The second, 'implied preemption' occurs where Congress has impliedly precluded state regulation by 'occupying the field' through the structure or objectives of federal law. Intent to supersede state law altogether may be found where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *Cuomo, supra*, citing *Guerra, supra*, 479 U.S. at 280-81, 107 S.Ct. at 689.
>
> 3. "As a third alternative, in those areas where Congress has not completely displaced state regulation, federal law may nonetheless preempt state law to the extent that the one conflicts with the other. This is 'conflict preemption'. Such conflict occurs either because 'compliance with both federal and state regulations is a physical impossibility' or because the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Cuomo, supra*, citing *Guerra, supra*, 479 U.S. at 281, 107 S.Ct. at 689 (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217-18, 10 L.Ed.2d 248 (1963) and *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941)).

Argument on Issue No. 1 regarding marijuana evidence concerns express preemption.

Argument on Issue No. 2, the FAHA preemption of state tort law regarding the design, construction, maintenance, and signage of the Interstate System concerns implied preemption and conflict preemption.

ARGUMENT ON ISSUE NO. 1

A. Louisiana state courts have decided an important question of federal law that has not been, but should be, settled by this Court: may a commercial truck driver who was tested positive for marijuana after a fatal accident keep the evidence of the test results from a jury in his tort action against the state?

The Louisiana proceedings involve a question of great importance to the safety of motorists across the entire country. That question is how to achieve what Congress has undertaken with regard to ridding the commercial trucking industry of drivers who use alcohol or drugs and then drive their 70,000 pound 18-wheel rigs on the highways of this nation, thereby endangering themselves and all others who use the roads.

A public policy against the use of alcohol and drugs in the transportation industry can be discerned from an examination of FOTETA, 49 U.S.C.A. § 31306, and DOT's implementing regulations.[2] FOTETA embodies a congressional

[2] The DOT promulgated the regulations pursuant to its authority under section 12005(a) of the Commercial Motor Vehicle Safety Act of 1986, 49 App.U.S.C.A. § 2505(a), Pub.L. 99-570, 100 Stat. 3207-171

(Continued on following page)

finding that "the greatest efforts must be expended to eliminate the . . . use of illegal drugs, whether on or off duty, by those individuals who are involved in [certain safety-sensitive positions, including] the operation of . . . trucks." Pub.L. 102-143, § 2(3), 105 Stat. 953. The implementing regulations come from the Federal Highway Administration ("FHWA"), Department of Transportation ("DOT"), in its federal motor carrier safety regulations. See Code of Federal Regulations, Title 49, Chapter III. The purpose of the DOT implementing regulations is set out in § 382.101: "The purpose of this part is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles."

FOTETA adds that "increased testing" is the "most effective deterrent" to "use of illegal drugs." § 2(5). It requires the Secretary of Transportation to promulgate regulations requiring "testing of operators of commercial motor vehicles for the use of a controlled substance." 49 U.S.C.A. § 31306(b)(1)(A). It mandates suspension of those operators who have driven a commercial motor vehicle while under the influence of drugs. 49 U.S.C.A. § 31310(b)(1)(A) (requiring suspension of at least one year for a first offense); § 31310(c)(2) (requiring suspension of at least 10 years for a second offense).

(October 27, 1986). The 1986 Act supplemented the Motor Carrier Safety Act of 1984, 49 App.U.S.C.A. § 2505, Pub.L. 98-554, Title II, § 206, 98 Stat. 2834 (October 30, 1984). The 1986 Act, in turn, was supplemented by Title V of the Omnibus Transportation Employee Testing Act of 1991, 49 App.U.S.C.A. § 2717(a), Pub.L. 102-143, Title V, § 5(a), 105 Stat. 952, 959 (October 28, 1991). These statutes were repealed by Pub.L. 103-272, § 7(b), 108 Stat. 1379 (July 5, 1994) and replaced by 49 U.S.C.A. §§ 31136 and 31306.

DOT regulation § 382.213(a) provides that "No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver uses any controlled substance . . . " 49 C.F.R. § 382.215 provides that "No driver shall report for duty, remain on duty or perform a safety-sensitive function, if the driver tests positive for . . . controlled substances. No employer having actual knowledge that a driver has tested positive for controlled substances . . . shall permit the driver to perform safety-sensitive functions." Further, 49 C.F.R. § 382.501(a) provides that: "No driver shall perform safety-sensitive functions, including driving a commercial motor vehicle, if the driver has engaged in conduct prohibited by subpart B of this part or an alcohol or controlled substances rule of another agency. No Employer shall permit any driver to perform safety-sensitive functions, including driving a commercial vehicle, if the Employer has determined that the driver has violated this section."

A motor carrier cannot require or permit someone to drive a motor vehicle unless that person is qualified to drive a motor vehicle. 49 C.F.R. § 391.11(a). A person is qualified to drive a motor vehicle if he is physically qualified to drive a motor vehicle. 49 C.F.R. § 391.11(b)(6). A person is not physically qualified to drive a motor vehicle if that person tests positive for marijuana. 49 C.F.R. § 391.41(b)(12). Furthermore, a person who tests positive for marijuana is medically unqualified to drive a motor vehicle. 49 C.F.R. § 391.15).[3]

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[3] Under the Federal Motor Carrier Safety Act (FMCSA), 49 U.S.C.A. §§ 31101-31162 (1994), Congress directed the Department of Transportation (DOT) to "proscribe minimum safety standards for commercial motor vehicles," and to ensure that the "physical condition

(Continued on following page)

When an accident involving a commercial driver occurs, 49 C.F.R. § 382.303(b) provides for post-accident testing: "As soon as practicable following an occurrence involving a commercial motor vehicle operating on a public road in commerce, each employer shall test for controlled substances for each of its surviving drivers: (1) Who was performing safety-sensitive functions with respect to the vehicle, if the accident involved the loss of human life."

From the statutes and regulations cited above, it can be clearly seen that Congress has placed a high priority on keeping truck drivers who use drugs off of our nation's highways. In fact, "[A]t this point in American history, few elements of public policy command the consensus that attaches to the policy against the use of controlled substances by those whose work potentially imperils others. Judicial decisions, agency regulations, and legislative enactments combine to form a solid phalanx of positive law evidencing a well defined and dominant public policy against the performance of safety-sensitive tasks while under the influence of drugs." *Exxon Corp. v. Esso Workers' Union, Inc.*, 118 F.3d 841, 849, (1st Cir. 1997), abrogated on other grounds, 531 U.S. 57, 121 S.Ct. 462, 148 L.Ed.2d 354.

Not wishing to leave to speculation the issue of federal preemption, Congress and DOT have enacted express

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of operators of commercial motor vehicles is adequate to enable them to operate such vehicles safely." 49 U.S.C.A. § 31136(a), (a)(3); see also *Graef v. Chemical Leaman Corp.*, 106 F.3d 112, 115 (5th Cir. 1997). Accordingly, the DOT enacted regulations, the Federal Motor Carrier Safety Regulations (FMCSR), 49 C.F.R. 390 et seq. which, among other things, establish the physical qualifications for drivers. See § 391.43.

preemption provisions.[4] At 49 U.S.C.A. § 31306(g), Congress wrote:

> **Effect on State and local government regulations.** – A State or local government may not prescribe or continue in effect a law, regulation, standard, or order that is inconsistent with regulations prescribed under this section. However, a regulation prescribed under this section may not be construed to preempt a State criminal law that imposes sanctions for reckless conduct leading to loss of life, injury, or damage to property.

DOT regulations also provide for preemption in its regulations:[5]

> **§ 382.109 Preemption of State and local laws.**
>
> (a) Except as provided in paragraph (b) of this section, this part preempts any State or local law, rule, regulation, or order to the extent that:
>
> (1) Compliance with both the State or local requirement in this part is not possible; or
>
> (2) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in this part.

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[4] "Congress can define explicitly the extent to which its enactments preempt state law." *English v. General Electric Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990).

[5] Federal regulations have the same preemptive effect as Federal statutes. *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 152-53, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982).

> (b) This part shall not be construed to preempt provisions of State criminal law that impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees, employers, or the general public.

The Court in *Keaveney v. Town of Brookline*, 937 F.Supp. 975, 982 (D.Mass. Jul 03, 1996), discussed the effect of the preemption language at § 382.109:

> "The scope of this language is broad. It encompasses situations where a State law attempts to regulate in the same area as a federal law, but in a contradictory manner. It also encompasses situations where the enforcement of a State law might thwart the intention of Congress. In addition, the Department of Transportation has stated that 'the purpose of preemption is to avoid the confusion and expense of inconsistent requirements for employers or testing entities that operate in several States . . . ' 59 Fed.Reg. 7317. I conclude that the Act's pre-emptive language is clear: any state law provisions, the enforcement of which would obstruct the deterrent effect of this legislation or the nationwide uniformity of testing rules, are pre-empted."

Even without the benefit of the express preemption language in FOTETA and the FHWA regulations, a court can also declare a state law preempted if it determines that the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Jones v. Rath Packing Co.*, 430 U.S. at 526, 97 S.Ct. at 1310 (1977).

The stage is now set to turn to the particular issue involved in the case *sub judice*. This issue, whether a state

court can exclude evidence of drug use by a commercial truck driver, is *res nova*.

As mentioned above, Clark's urine was tested for alcohol and drugs and the tests were positive.[6] All of these tests conformed to the standards established in the FWHA regulations and were in excess of proscribed limits.[7] Also, the EMIT urine tests and the GC/MS confirmation are the very same scientific data that Louisiana prosecutors rely upon to prove driving under the influence of a controlled dangerous substance.

At the *Daubert* hearing where the trial court granted plaintiffs' motion for partial summary judgment which dismissed defendants' affirmative defense that Clark was driving under the influence of marijuana (App. 51), the trial court admitted that the disagreement among experts

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[6] Evidence at trial showed that Hewlett-Packard, who manufactured the GC/MS machine used by the Crime Lab, published a scientific formula for determining the amount of Carboxy-THC in a urine sample when the level is not precisely quantified by the test results. Wimbish, one of DOTD's experts, used this formula to determine that at the time of the accident, Clark's urine contained a high level of Carboxy-THC, somewhere in the range of 600-700 ng/ml. This level of Carboxy-THC indicated use within at least 24 hours of 9:30 a.m. on August 6, 1994, the time the urine sample was drawn at Baton Rouge General Hospital.

[7] "Reduction of Marijuana Initial Test Level

In its June 9, 1994, revision to its drug testing guidelines, DHHS reduced the initial test level for marijuana metabolites from 100 ng/ml to 50 ng/ml. This rule changes the initial test level for marijuana in Part 40 to conform with the revised DHHS guidelines. This change is consistent with the existing language of § 40.29(e)(2), which states that the initial test levels for drugs are subject to change by DHHS. Since the new DHHS guidelines go into effect September 1, 1994, this provision will be effective on that date, so that DHHS and DOT testing level requirements remain consistent with one another." 59 FR 42996, at 42998.

on the issue of use of marijuana and impairment should be resolved by the jury, but then ruled that, based on credibility determinations, there was not sufficient evidence to arrive at the conclusion of impairment at the time of the accident. Based on this ruling, the jury never got to hear about the evidence of Clark's marijuana use at the trial on the merits.

Upon appeal, the CA correctly overruled the trial court's order granting plaintiffs' motion *in limine* (App. 7-17). The CA also correctly reversed and found that the trial court erred in granting the motion for summary judgment on defendant's affirmative defense of impairment due to marijuana use (App. 7-17). The appellate court agreed with the trial court's remarks that the majority of the evidence should have been presented to the jury (App. 10). However, the CA erred as a matter of law in conducting a limited *de novo* review of the marijuana evidence, finding that the exclusion of this critical evidence concerning driver impairment in a one-vehicle accident was harmless error because, based on the marijuana evidence alone, and not all the evidence presented at trial, DOTD failed to meet its burden of proving driver impairment, and that the marijuana evidence would not have changed the jury's verdict. (App. 17). A writ application to the LSC citing this error was denied (App. 75-76).

To allow the *Wingfield* decisions to stand would give state courts the authority to impose tort and evidence standards inconsistent with the FOTETA regulations, standards which would serve as an obstacle to the accomplishment and execution of the drug testing procedures. The state action constitutes a prohibited "order" as contemplated by 49 C.F.R. § 382.109(a) which "is an obstacle to the accomplishment and execution of any requirement

in this part." See *Rector v. LabOne, Inc.*, 208 F.Supp.2d 987, 995 (E.D.Ark. Jun 24, 2002).

The intent of the federal scheme to make our highways safe from drug-using commercial truck drivers[8] would be thwarted and rendered totally ineffective if a state court has the discretion to totally ignore a test showing a driver had marijuana in his/her system during a fatal accident. Clark, a resident of Arizona, was hauling cattle on I-10 through Baton Rouge, Louisiana, from Florida back to his home state. He was engaged in interstate commerce and had no connection to the state of Louisiana other than simply passing through it. The citizens of Louisiana, who must ultimately pay the substantial judgment rendered in this matter if a new trial is not granted due to the error of the Louisiana courts, have not received a fair hearing in this matter. Surely the intent of Congress is such that a jury should be allowed to hear that a commercial truck driver tested positive for marijuana under standards mandated by federal statutes and regulations. To find otherwise would allow commercial drivers to escape any consequences of their drug use.

A recent Louisiana case which arose in federal court also involved a truck driver, Sargent, who admitted during his deposition that he had taken five or six "hits" of marijuana about eight hours prior to the accident and that he got "high." *Bocanegra v. Vicmar Services, Inc.*, 320 F.3d 581, (5th Cir. (La.) Feb 19, 2003) (NO. 01-31121), rehearing denied (Mar 25, 2003), petition for certiorari filed, 72

[8] "When it comes to controlled substances, unlike alcohol which can be consumed legally, a user is by definition an abuser." *U.S. v. Simmons*, 130 F.3d 1223, 1224 (7th Cir. (Ill.) Nov 19, 1997).

USLW 3007 (Jun 23, 2003) (NO. 02-1858). The *Bocanegra* court reached the opposite conclusion of the *Wingfield* appellate decision by finding that an error by the trial court in blocking testimony of the use of marijuana by a commercial driver is not harmless error. The court went on to say that:

> "If all variables were required to be eliminated in a case where an actor has used marijuana or another drug and then been involved in an accident, evidence of drug use would never be presented to the fact-finder. Without evidence of Sargent's marijuana use in this case, the evidence presented at trial bore little resemblance to what actually happened."
>
> *Bocanegra v. Vicmar Services, Inc.*, page 589.
>
> "Because the trial court excluded all evidence of Sargent's marijuana use, the jury was not presented with a complete picture of what happened on the night in question. In closing argument, Appellees repeatedly argued that Sargent reacted reasonably and did the best he could under the circumstances. As Bocanegra argues, it is difficult to see how one who smokes marijuana eight hours before driving an industrial vehicle 'did the best he could.' On the record before us, we conclude that Bocanegra's substantial rights were affected because the jury was prevented from even considering the critical issue of whether Sargent's marijuana use affected his ability to react appropriately to the disabled van in his lane of travel on the night of the accident."
>
> *Bocanegra v. Vicmar Services, Inc.*, page 590.

As in *Bocanegra*, there was evidence that Clark used marijuana within 24 hours prior to the accident and that his perception/reaction time was impaired. Without evidence of Clark's marijuana use sometime prior to his accident, what

the jury heard at trial bore "little resemblance to what actually" happened on the approach ramp on August 6, 1994, when Clark drove off of the ramp.

In another similar case, *Ruiz Troche v. Pepsi Cola of Puerto Rico*, 161 F.3d 77 (1st Cir. 1998), the First Circuit held that the trial court had abused its discretion because it had imposed standards more stringent than those found in *Daubert*. In *Ruiz*, the trial court excluded the defendant's testimony of a well-qualified pharmacologist regarding the significance of a toxicology report's findings of cocaine and benzoylecgonine in a deceased's blood. More specifically, the expert had been prepared to testify (1) that the deceased had snorted 200 milligrams of cocaine within an hour of the fatal accident; and (2) that cocaine impairs senses and abilities affecting driving, decreases perception, and increases risk-taking. Id. at 81. The plaintiffs had contended that the cocaine and metabolite levels in the bloodstream could not be correlated to an initial cocaine dosage or impairment level with the requisite reasonable degree of scientific certainty. In reversing the trial court's ruling, the First Circuit held that the expert's testimony derived from a reliable methodology sufficient to satisfy *Daubert*. The court recognized that the lower court had improperly required "that science be able to declare that a precise quantity of cocaine in the bloodstream produces an equally precise degree of impairment." Id. at 86. The lower court had sought "a level of assurance that science realistically cannot achieve and that *Daubert* does not demand." Id.

If a jury cannot hear evidence of a positive marijuana test, then the carefully created policy put in place by Congress to prevent commercial truck drivers from using drugs is an exercise in futility. If the preemption language

in FOTETA and the regulations can be thus ignored, each state could then create its own standards with regard to interstate truckers and their use of alcohol and drugs. If that happens, then a jury will be unable to learn what actually transpires in the causation of many accidents and innocents will be deprived of a fair and impartial trial.

B. The LSC has decided an important federal question, i.e., federal preemption of state law with regard to the use of a controlled dangerous substance by an interstate truck driver, that conflicts with the decision of the Oklahoma Supreme Court.

In *Farm Fresh Dairy, Inc. v. Blackburn*, 841 P.2d 1150 (Okla. Nov 03, 1992), Farm Fresh fired its employee truck driver, Blackburn, after he tested positive for marijuana use. He was awarded unemployment compensation benefits by the Employment Security Commission which award was affirmed all the way up to the Oklahoma Supreme Court. In affirming the award, the Commission's Board of Review said, " . . . a positive drug screen, absent from any evidence of impairment or strange behavior . . . " did not amount to misconduct under Oklahoma unemployment statutes. Id. 1151. Farm Fresh brought suit in the District Court for review of the Commission's order. The trial court ruled that the Commission had acted within its discretion and affirmed the Commission's award. The court of appeal affirmed the trial court, holding that the Commission could properly hold that failing a drug test, without more, was insufficient to prove "misconduct conducted with his last work."

The Oklahoma Supreme Court held that the trial court and the court of appeal were wrong and that the

Commission improperly added the requirement of proof of impairment or strange behavior to Farm Fresh's burden of proof. The court went on to find that "Farm Fresh's drug policy was federally mandated. The goals of these federal requirements are stated in the federal regulations: The overall goal of the required testing is to ensure a drug free transportation environment which in turn will reduce accidents and casualties in motor carrier operations." Id, 1151. Further:

> "Under this rule, a driver may not use controlled substances on or off duty. . . . A driver cannot be hired or used if he/she has a confirmed positive drug test as a result of . . . random test. A person who tests positive for the use of a controlled substance . . . is medically unqualified to operate a commercial motor vehicle.
>
> A strong, and wise, federal public policy exists to insure that the operators of commercial vehicles do not use drugs, either on or off duty. The clear purpose of this policy is to protect the motoring public, including Oklahoma motorists. . . . Clearly, the Commission's requirement that an employer must show both a positive drug test and impairment or odd behavior on the job weakens the policy that commercial drivers refrain from all drug use. When an employer fires a commercial driver because the driver has tested positive for drug use, the Commission may not impose additional requirements of proof on the employer before denying unemployment benefits. To do so has a chilling effect on the public policy prohibiting commercial drivers from ever using drugs."

Farm Fresh Dairy, Inc., at 1152.

Other states, as well as a federal court, have addressed the impact of the federal regulations on state

unemployment laws and have concluded that the federal rules preempt state law regarding off-duty use of controlled substances. See, e.g., *Yellow Freight System, Inc. v. Amestoy*, 736 F.Supp. 44 (D.Vt.1990); *Golden Eagle Distributors, Inc. v. Arizona Department of Economic Security*,[9] 885 P.2d 1130 (Ariz.App.1994); *Burns Bros., Inc. v. Employment Div.*, 133 Or.App. 56, 890 P.2d 423 (Or.App. Feb 15, 1995).

A trial judge and a state appellate court usurped the function of a jury in the case *sub judice* when they decided that there was not sufficient evidence of driver impairment to allow a jury to hear the marijuana evidence. These rulings are analogous to the actions of the Oklahoma Commission in *Farm Fresh*, *supra*, and they, too, have a "chilling effect on the public policy prohibiting commercial drivers from ever using drugs."

State tort law is an area traditionally left to the states and the federal courts are reluctant to intervene. However, where Congress has placed a high priority on highway safety by implementing a comprehensive program of drug testing commercial truck drivers, the preemptive intent of the program must be fulfilled. Congress' effort at improving railroad safety is an example of where another safety program led to preemption of state tort law with regard to signals at highway railroad crossings in *CSX Transp., Inc.*

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[9] "We therefore hold that where an employer shows that it discharged an employee for failing a drug test, which was mandated by federal law for the protection of the employees and, more importantly, of the general public, the former employee is disqualified from receiving unemployment insurance benefits if the positive drug test disqualified the employee from continuing to work in his normal capacity." Page 1134.

v. Easterwood, 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993) and *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344, 120 S.Ct. 1467, 146 L.Ed.2d 374 (2000).

This Court is not being asked to invade the province of the state courts in all cases where drugs are involved, only those involving drivers covered by the FHWA drug program. This is a distinction that can be easily made. The State of Louisiana makes just such a distinction by holding professional truck drivers "to a high standard of care to the motoring public." *Davis v. Witt*, 2003 WL 21511351 (La., July 2, 2003).[10]

Applicant, DOTD, respectfully asks this Honorable Court to invoke its discretionary powers and grant this writ, ultimately granting DOTD a new trial where the jury will be allowed to hear evidence of Clark's marijuana use.

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[10] "The jurisprudence has recognized that commercial truck drivers are required to undergo testing and licensure which involve attending a special school designed to teach the mechanics and attendant hazards of operating large rigs. *LeBlanc v. Steptore*, 98-808 (La. App. 3 Cir. 12/9/98), 723 So.2d 1056, 1063, writ denied, 99-0087 (La. 3/12/99), 739 So.2d 772. Based upon that premise, our courts have recognized that a professional truck driver is a superior actor in the eyes of the law. *Stapleton v. Great Lakes Chemical Corp.*, 627 So.2d 1358 (La. 1993)..." at page 13.

ARGUMENT ON ISSUE NO. 2

A. Louisiana state courts have decided an important federal question in a way that conflicts with relevant decisions of this Court. Louisiana state courts have also decided on a closely related important question of federal law that has not been, but should be, settled by this Court: does the FAHA preempt state tort law regarding the design, construction, and signage on the Interstate Highway System?

The origin of present federal-aid highway legislation is found in the Federal-Aid Road Act, which became law on July 11, 1916. In 1944, the Federal-Aid Highway Act of 1944 was enacted. The act required the designation of a National System of Interstate Highways which would be made a part of the primary system and would connect the principal metropolitan areas, cities, and industrial centers, serve the national defense, and connect at border points with routes of continental importance in Canada and Mexico. In 1956, Congress enacted another Federal-Aid Highway Act and the Highway Revenue Act of 1956, which are the foundations of the present Interstate and A-B-C systems.[11]

Congress, in enacting the FAHA, has promulgated an extensive set of laws. The IS consists of highways designed, located, and selected in accordance with 23 U.S.C.A. § 103(c)(A)(B) and shall be designed in accordance with the standards of § 109(b). 23 U.S.C.A. § 109(b) and (d) are laws that directly touch upon IS design and

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[11] 1966 WL 4362 (Leg.Hist.) S. Rep. No. 1410, 89th Cong., 2nd Sess. 1966, 1966 U.S.C.C.A.N. 2800, P.L. 89-574, federal-aid highway act of 1966 Senate Report (Public Works Committee).

signage and 23 U.S.C.A. §§ 106 and 114(a) are statutes that directly "touch" upon the federal power to supervise and approve construction as occurred in the case *sub judice*.

The I-10 ramp project where this accident occurred was designed and constructed with the approval of the Department of Commerce, Bureau of Public Roads (BPR), and 90% federal funds were used in its construction; 23 U.S.C.A. §§ 109(b) and 114(a). Because the term "highway" includes sign, guardrail, and protective structures in connection with a highway (23 U.S.C.A. § 101(a)(11)), and the term "project" is defined as any other undertaking eligible for assistance under this title (23 U.S.C.A. § 101(a)(21)), then the signs in place at the time of the accident in question were put there as a "highway project" on an IS in which federal funds participated and their locations were approved by the FHWA pursuant to 23 U.S.C.A § 109(d). In addition, 23 U.S.C.A. § 116(c) provides if a project is not maintained properly, the federal government shall withhold federal funding.

In *Norfolk, supra*, the widow of a motorist killed in a crossing accident sued the railroad, alleging failure to maintain adequate warning devices at the grade crossing. This Court held that the Federal Rail Safety Act ("FRSA"), in conjunction with FHWA's regulations addressing the adequacy of warning devices installed with federal funds, preempts state tort actions. *Norfolk,* 529 U.S. at 347; 120 S.Ct. at 1471. *Norfolk* and this case on the original design, signage, and construction are very similar (except that the FRSA has a preemption provision). 23 C.F.R. § 646.214(b)(3) and (4) and 23 U.S.C.A. § 109(b) and (d) have identical language (both require FHWA approval of projects) so the

Norfolk case is extremely persuasive. In *Norfolk*, *supra*, at pages 354-355, this Court held that:

> "As a result, once the FHWA has funded the crossing improvement and the warning devices are actually installed and operating, the regulation displaces state and private decision making authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained." (Citations omitted.)
>
> "Thus, the warning devices in place at a crossing improved with the use of federal funds have, by definition, been specifically found to be adequate under a regulation issued by the Secretary. Any state rule that more or different crossing devices were necessary at a federally funded crossing is therefore preempted." (Citations omitted.)

IMPLIED PREEMPTION

Implied preemption exists when the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. Or the act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947) (Other citations omitted).

23 U.S.C.A. § 101, *et seq.*, "touches" on fields concerning design, construction, signage, and maintenance of the IS. "Intent to supersede state law altogether may be found where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation."

Guerra, 479 U.S. at 280, 107 S.Ct. at 689, *citing Rice*, *supra*. FAHA is sufficiently comprehensive to preempt state law.

23 U.S.C.A. § 109(o) provides that:

> "Projects (other than highway projects on the National Highway System) shall be designed, constructed, operated, and maintained in accordance with State laws, regulations, directives, safety standards, design standards, and construction standards."

Congress has made an express determination and policy decision that projects on the National Highway System, which include I-10 where the accident occurred, shall be designed, constructed, operated, and maintained in accordance with federal laws, whereas state highways not part of the federal highway system are governed by state law.

Congress intends that federal law occupy the field of the IS exclusively and Louisiana tort law has no room to operate. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 115 S.Ct. 1483, 1487 (1995) *citing English v. General Elec. Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 2274-2275, 110 L.Ed.2d 65 (1990)

CONFLICT PREEMPTION

Conflict preemption "occurs either because compliance with both federal and state regulations is a physical impossibility, or because the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Paul*, *supra*, 373 U.S. at 142-143, 83 S.Ct. at 1217-18. It is clear that common law tort actions, such as in the case *sub judice*, are preempted in that they conflict with the express intent of Congress to

provide for a uniform and safe IS for defense and interstate commerce. Under this ruling, it is possible that there would be 50 different design standards, safety rules, and construction standards for the IS. This case vitiates the cooperation between the states and federal government and the federal government's control in building the IS.

When the Secretary approves a project and funds are expended for that project, then the approval presupposes that the Secretary authorized that expenditure, which, in turn, legally presupposes that the Secretary determined that the design, construction, and signage of the project were adequate to the task. See *Hester v. CSX Transp. Inc.*, 61 F.3d 382, 387 (5th Cir. 1995). Therefore, the federal government has mandated federal standards for the IS and federal law will apply. State tort law in conflict with the federal law cannot stand. 23 U.S.C.A. § 109(o).

The IS is a uniquely federal creation. "[W]e have held that a few areas involving 'uniquely federal interests,' are so committed by the Constitution and laws of the United States to federal control that state law is preempted and replaced where necessary by federal law of a content prescribed (absent explicit statutory directive) by courts – so called 'federal common law.'" *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988) (Other citations omitted). One may argue that there is not sufficient conflict to justify preemption, which applicant denies. However, even if that is true, because the IS is a uniquely federal interest "the fact that the area in question is one of unique federal concern changes what would otherwise be a conflict that cannot produce preemption into one that can." *Boyle*, U.S. at 507-508, 108 S.Ct. at 2516.

The CA held that "The FAHA standards do not attempt to supersede the prohibition in our state law against negligent acts of design, construction, or signage or the imposition of strict liability. Nothing in the FAHA provided an alternative to our tort law or required the state to build an unreasonably dangerous and defective highway." (App. 6.) Accepted at face value, the CA's ruling supplants its opinion of the safety of the IS for that of the Secretary, which is contrary to the intent of Congress. Once the project was approved and funded by FHWA/BPR, then it met a federal standard of adequacy and, therefore, Louisiana tort law could not then determine it to be "unreasonably dangerous."

The decisions of the Louisiana courts also conflict with the *Norfolk*, *supra*, and *Boyle*, *supra*, decisions of this court regarding preemption of state tort law and should be reversed.

This is not an attempt to invade the area of tort law which is traditionally left to the states, as stated by the CA (App. 6). The IS is a uniquely federal creature. Applicant submits that this is a case of first impression regarding the preemptive effect of the FAHA on state tort law claims regarding the IS and this Court should exercise its supervisory jurisdiction.

Respectfully submitted,

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835 So.2d 785

Court of Appeal of Louisiana,
First Circuit.

Gordean Adella WINGFIELD, Individually and as Guardian and Conservator of the Estate of Her Major Son, Kenny Clark

v.

STATE of Louisiana Through the DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, Wilson Trailer Company, Inc. and National Union Fire Insurance Company of Pittsburgh, PA. Jackie Murray, Sharon Ray Rovner, Ivy J. Wills as Legal Guardian and Attorney for Joseph Edward Wingfield and Joseph Edward Wingfield

v.

State of Louisiana, Through the Department of Transportation and Development and Wilson Trailer Company, Inc.

No. 2001 CA 2668, 2001 CA 2669.

Nov. 8, 2002.
Rehearing Denied Dec. 31, 2002.
Writ Denied May 30, 2003.

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Isaac H. Ryan, Robert E. Kerrigan, New Orleans, David F. Bienvenu, Nathan L. Schrantz, New Orleans, Counsel for Defendant-Appellant National Union Fire Insurance Company of Pittsburgh, PA.

Before: FITZSIMMONS, GAIDRY and JAMES[1], JJ.

FITZSIMMONS, J.

On August 6, 1994, Mr. Kenneth Clark and his stepfather, Mr. Jack Ray Wingfield, both commercial truck drivers, were hauling a load of cattle from Florida to Arizona via Interstate Highway 10, westbound. A fatal accident occurred when the driver of the double decked tractor-trailer, Mr. Clark, entered a sharply curving ramp on the interstate, just before the Mississippi River Bridge in Baton Rouge, Louisiana. At the time of the accident, approximately 5:50 a.m., Mr. Wingfield was asleep in the sleeper compartment of the tractor cab.

The tractor-trailer rolled over the ramp railing and landed on the highway below. Mr. Wingfield subsequently died of the massive injuries he sustained. Mr. Clark also suffered serious injuries, including an injury to his brain that left him totally disabled and unable to care for himself.

Mr. Wingfield's wife, individually and as guardian for her son, Mr. Clark, filed suit on June 22, 1995. Mrs. Wingfield alleged that defendants, State of Louisiana, through the Department of Transportation and Development (DOTD), and its insurer, National Union Fire

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[1] The Honorable A. Clayton James, Judge, retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

Insurance Co.,[2] were liable for all the damages sustained. She alleged that the DOTD knew that the interstate, at the site of the accident, was unreasonably dangerous because of defective design and inadequate warning signs. On July 21, 1995, plaintiffs, Jackie Murray, Sharon Ray Rovner, Ivy J. Wills as guardian for Joseph Edward Wingfield, and Joseph Edward Wingfield, filed a separate petition for damages based on essentially the same allegations. Jackie, Sharon, and Joseph are children of the deceased Mr. Jack Wingfield. Their mother, Ivy Wills, is the former spouse of the decedent. The two suits were consolidated.

After a jury trial, the jury found defendants, DOTD and its insurer, liable and attributed to them 54% of the fault. Mr. Clark, the driver, was found to be 46% at fault. The jury awarded damages totaling almost fourteen million dollars. A judgment implementing the jury's verdict was signed on May 25, 2001. The judgment assessed 66 percent of the taxable costs to defendants, and also imposed on DOTD 100% of the fault for the survival and wrongful death actions arising from Jack Wingfield's injuries and death.

Subsequently, plaintiffs filed a rule to tax costs, a post-trial motion for a new trial, and, in the alternative, a motion to have repealed Louisiana Revised Statutes 13:5114 declared unconstitutional. Defendants filed a motion for judgment notwithstanding the verdict (JNOV), and in the alternative, a motion for new trial. By judgment

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[2] Other parties were cited as defendants, but on appeal, we have only named the defendant-appellants.

dated August 3, 2001, the various motions were decided, and the May 2001 judgment was amended where necessary and adopted. The trial court granted the JNOV, and reduced the Wingfield survival action award from $800,000.00 to $500,000.00. The trial court excluded from a reversionary trust, previously ordered by the trial court, the jury's award of future economic losses, but affirmed the inclusion in the trust of Mr. Clark's award for future medical expenses. The rule to tax costs, which asked for the trial court to give a specific amount of the plaintiffs' expenses to be paid by defendants, was taken under advisement, but is not at issue here. All other motions were denied.

Defendants appealed. Plaintiffs answered the appeal.

FEDERAL PREEMPTION

Before trial, defendants filed a motion for summary judgment on the issue of federal preemption of Louisiana tort law. Defendants alleged that the highway in question had been designed, built, and signed as a joint state and federal project, but with the mandated approval of the federal government and with 90 percent of the funding provided by the federal government. Based on their claim of preemption, defendants argued that plaintiffs could not seek damages based on alleged defects in a highway designed, constructed, and signed under federal requirements. The thrust of the argument seems to be that federal approval equates to the absence of any negligence or liability for the state. Initially, plaintiffs pointed out that the applicable federal law, the Federal Aid Highway Act (FAHA), 23 U.S.C. § 101, et seq., did not contain any express preemption clause. They also argued that federal

funds are linked to the state's compliance with the FAHA, but the FAHA does not provide any remedy to a victim of negligence. Finally, plaintiffs asserted that Louisiana tort law does not conflict with or frustrate the purpose or goal of the FAHA. Thus, the federal standards and rules are not meant to preempt by implication or by operation all of Louisiana tort law. After a hearing, the trial court denied the motion. Defendants assigned error to that ruling.

Federal preemption of an area of law may be either express or implied. *Haydel v. Hercules Transport, Inc.*, 94-1246, p. 6 (La.App. 1 Cir. 4/7/95), 654 So.2d 418, 423, *writs denied,* 95-1172 (La.6/23/95), 656 So.2d 1019. Particularly in an area of law traditionally occupied by the state, the party claiming preemption must show an express preemptive clause in the federal law. Alternatively, the party must overcome an assumption of state sovereignty and prove "a clear and manifest purpose" by Congress to supersede state law. *Rice v. Santa Fe Elevator Corporation,* 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947); *see Haydel*, 94-1246 at p. 6, 654 So.2d at 424. In a similar vein, the court may find preemption when "compliance with both federal and state regulations is a physical impossibility," or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. . . . " *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 141-43, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), quoting *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941); *Haydel,* 94-1246 at pp. 6-7, 654 So.2d at 424. If Congress's intention is ambiguous, there is a general presumption against preemption. *See Florida Lime & Avocado Growers, Inc.,* 373 U.S. at 146-47, 83 S.Ct. at 1219.

Defendants reference no express preemption clause in the FAHA. *Compare Duncan v. Kansas City Southern Railway Co.,* 2000-0066, p. 7 (La.10/30/00), 773 So.2d 670, 678, *cert. denied,* 532 U.S. 992, 121 S.Ct. 1651, 149 L.Ed.2d 508 (2001) (The federal act contained an express preemption provision.). On the contrary, the FAHA contains the following: "appropriation of Federal funds . . . under this chapter shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed. The provisions of this chapter provide for a *federally assisted State program.*" 23 U.S.C. § 145(a) (Emphasis added.).

Tort law falls within the traditional power of this state to protect its citizens. Louisiana tort law is designed to place the burden of repair on those that caused the damage or on those persons who had custody of damage-causing property. La. C.C. art. 2315 & 2317. The object of the FAHA is to promote, through federal funding, the construction of federal aid highways. *See* 23 U.S.C. § 101, et seq.; *State of Vermont v. Goldschmidt,* 638 F.2d 482, 483 (2nd Cir.1980). The FAHA does provide standards, but the issue here is not whether the highway met the minimum standards necessary for federal funding. *See* 23 U.S.C. § 109 (standards). The issue is whether the highway was an unreasonably dangerous one; defective by inadequate warnings and in design. The FAHA standards do not attempt to supersede the prohibition in our state law against negligent acts of design, construction, or signage or imposition of strict liability. Nothing in the FAHA provided an alternative to our tort law or required the state to build an unreasonably dangerous and defective highway. Thus, based on our thorough review of the record, we see no error in the trial court's denial of the

summary judgment on the issue of preemption. The defendants failed to prove a manifest intention by Congress to replace Louisiana tort law with the FAHA, or prove that our tort law stands as an obstacle to the federal standards of design, construction, or signage.

VALIDITY OF MEXICAN MARRIAGE

Defendants assigned error to the trial court's denial of their peremptory exception raising the objection of no right of action against the claims asserted by Mrs. Gordean Wingfield, the alleged spouse of the deceased, Mr. Jack Wingfield. Defendants asserted that the Wingfield marriage was not valid; thus, she was not the right party to assert the survival and wrongful death actions. *See* La. C.C. arts. 2315.1A(1) & 2315.2A(1).

Louisiana recognizes marriages that are valid under the law of the state (1) where contracted or (2) where the spouses were first domiciled. La. C.C. art. 3520. After a thorough review of Mrs. Wingfield's testimony concerning her marriage, her documentary evidence, and applicable California law (first marital domicile), we cannot say that the trial court erred in denying DOTD's exception of no right of action. *See Freeman S.S. Co. v. Pillsbury,* 172 F.2d 321, 323-24 (9th Cir.1949); *McMurren v. McMurren,* 143 Cal.App.2d 804, 299 P.2d 888 (1956).

EVIDENCE OF MARIJUANA USE

During the proceedings below, plaintiffs filed a motion to exclude the expert testimony of defendants' experts on the issue of the alleged use of marijuana by the driver of the truck, Mr. Clark, and filed a motion for partial

summary judgment on DOTD's "Affirmative Defense of Comparative Negligence for Driving Under the Influence of Marijuana."[3] On December 21, 2000, a hearing was held to resolve various issues raised concerning the admissibility of the marijuana evidence and plaintiffs' motion for summary judgment. At the hearing, exhibits and testimony were presented.

At the end of the December hearing, the trial judge candidly admitted that the disagreements among the experts on the issue of use and impairment, and its effect on driving, should be resolved by the jury. Additionally, the trial judge noted that most relevant evidence was prejudicial to one side or the other, but that generally the evidence on the impairment issue should go to the jury. However, the judge then made several credibility determinations concerning the various opinions of the experts. Based on the credibility determinations, the judge found that there was not sufficient evidence to arrive at the conclusion of impairment at the time of the accident. These factual findings and the court's conclusion served as the basis for the trial judge's grant of the motion to exclude defendants' experts' testimony regarding marijuana and grant of the partial summary judgment dismissing the defendants' affirmative defense of Mr. Clark's negligence in driving under the influence of marijuana. The excluded evidence from both sides was proffered.

[3] Other matters argued at the hearing, and decided by a judgment dated January 10, 2001, are not listed as they are not at issue in this appeal.

On appeal, defendants assigned error to the exclusion of the evidence of the alleged marijuana use. They argue that the exclusion of the evidence tainted the jury verdict and requires a *de novo* review.

To be admissible, evidence must be relevant and not unduly prejudicial. La. C.E. arts. 104 & 401-403. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." La. C.E. art. 702. Additionally, our supreme court has adopted federal jurisprudential guidelines, provided in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), to aid in interpreting article 702 and ensure that scientific and technical expert testimony meets minimal standards of reliability and relevance. *See State v. Foret*, 628 So.2d 1116, 1123 (La.1993).

The *Daubert/Foret* guidelines require that expert opinions be grounded in approved methods and procedures of science, rather than just subjective belief or unsupported speculation. The trial court must also ensure that the scientific "evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589, 113 S.Ct at 2795; *see* La. C.E. 104 & 401-403. Before the expert opinion can be admitted, the trial court must make "a preliminary assessment" that "the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592-93, 113 S.Ct. at 2796; *Vardaman v. Baker Center, Inc.*, 96-2611, p. 6 n. 6 (La.App. 1 Cir. 3/13/98), 711 So.2d 727, 731 n. 6. The court

must also determine whether the "probative value" of the expert testimony or opinion would be "substantially outweighed by the danger of" confusion or an undue prejudicial effect on the fact finder. La. C.E. art. 403; *see Foret,* 628 So.2d at 1127; *Fussell v. Roadrunner Towing and Recovery, Inc.,* 99-0194, p. 3 (La.App. 1 Cir. 3/31/00), 765 So.2d 373, 376, *writ denied,* 2000-1264 (La.6/23/00), 765 So.2d 1042; *State v. Brooks,* 98-1151, p. 19 (La.App. 1 Cir. 4/15/99), 734 So.2d 1232, 1242, *writ denied,* 99-1462 (La.11/12/99), 749 So.2d 651. To fulfill the trial court's gatekeeper function for proposed expert evidence, various factors may be considered by the trial judge: (1) whether the technique has been subjected to peer review or publication, (2) the "known or potential rate of error," (3) a "reliability assessment," in which the "degree of acceptance" within a scientific community may be determined and reviewed, and (4) the "testability" of the technique. *Daubert,* 509 U.S. at 593-94, 113 S.Ct. at 2796-2797. However, the approach is a flexible one, and the list of factors is neither exclusive nor mandatory. *Daubert,* 509 U.S. at 593-95, 113 S.Ct. at 2796-2797. The admission of evidence, expert or otherwise, is subject to the trial court's discretion. *Fussell,* 99-0194 at p. 3, 765 So.2d at 375; *see State v. Catanese,* 368 So.2d 975, 983 (La.1979).

After a review using the *Daubert/Foret* guidelines, and considering relevancy and possible prejudice, we agree with the judge's initial remarks that the majority of the evidence should have been presented to the jury. A legal error occurred when the trial judge based his ruling not on the evidentiary articles and jurisprudence governing admissibility, but on his own credibility decisions and choice of expert opinions. The legal error of the use of the

wrong standard led to an abuse of the trial court's discretion in admissibility rulings.

Although the mere mention of marijuana may carry some prejudice, the presence of a controlled substance in a driver's system may certainly be relevant "as long as it could be reliably determined" that the driver used the drug within a period of time that could probably "impair one's ability to drive." *Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Company,* 161 F.3d 77, 83 (1st Cir.1998). With the presentation of evidence from both sides, the possibility of baseless prejudice engendered by a general bias against marijuana smokers would be addressed. The specific scientific knowledge imparted by the experts would be more probative than prejudicial. *See* La. C.E. art. 403.

The tests available to determine levels of marijuana in one's system and its effects on driving are far from settled areas of science. It was not defendants' burden to present evidence with an absolute degree of certainty, and not the trial judge's function to determine which theory was the best supported. *See Ruiz-Troche,* 161 F.3d at 85. The *Daubert/Foret* guidelines require "only that the proponent of the evidence show that the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion." *Id.*

In this case, defendants' experts offered evidence of three different immunoassay or Emit tests and a separate gas chromatography and mass spectrometry (GC/MS) test. All of these tests showed that the driver's urine was positive for marijuana. Although a certain procedure for confirmation is preferred, the same positive result from the Emit tests and the GC/MS test could have been

reasonably viewed as a confirmation of the positive finding, which provided the necessary reliability for admission. For the next step in their analysis, defendants' experts used the findings from the Emit tests as proof that the driver's urine had a level at, or greater than, 100 nanograms per milliliter of carboxy THC (metabolite of marijuana). While formulating his opinion, a defense expert consulted the lab that reported the level at, or greater than, 100 nanograms about a possible ambiguity in the testing procedures. The lab answered the concerns and affirmed the result. From eyewitness testimony of the driver's past use, the driver could be reasonably classified as an occasional user of marijuana. With that classification and reported test level, and drawing from accepted, published studies, the defendants' experts concluded that, on average, marijuana use would have occurred within 24 hours. After consulting published studies showing that cognitive skills could be affected by marijuana use within 24 hours, defendants' experts then analogized driving decisions to some of the studied cognitive skills. Defendants also pointed to a study showing how flight skills were affected by marijuana use, and analogized flight skills to driving skills. Finally, considering alleged facts related to the accident, such as speeding, failure to brake, or failure to slow properly, defendants' experts opined that impairment of the driver from marijuana use was probable and could have contributed to the cause of the accident.

Plaintiffs' experts testified that blood tests were more reliable for quantifying the actual level of marijuana in a human's system and judging impairment. In the opinion of plaintiffs' experts, impairment could not be inferred or found from a urine test alone. Additionally, plaintiffs attacked the procedures employed by the various labs

reporting the Emit and GC/MS test results, the limitations of urine testing, the defendants' interpretation of reported scientific studies, and the conclusions drawn from the test results and the experts' analyses. As an example of the limitations of urine tests, any attempted quantification should be adjusted to account for variations in the strength of marijuana, the user's history of usage, and height and weight of the user. These attacks may have rebutted and even overwhelmed defendants' allegations of actual impairment, but did not establish that all of the opinions of defendants' experts were based on unacceptable scientific studies, or establish that the majority of their opinions were scientifically unreliable. Additionally, isolated testimony may have inferred that defendants' experts concluded impairment based only on the urine levels. However, a consideration of all of the testimony showed that other factors were relied on as well. In fact, one of the plaintiffs' experts used an essentially similar analytical process to determine impairment. Though one of plaintiffs' experts preferred to use allegedly more reliable blood tests, she deduced impairment from test results and a similar combination of factors as those considered by defendants' experts. For example, the blood test results, predictive models for estimation of use times, and studies on the effects of marijuana during the determined time frames were used to find impairment. Additionally, the plaintiffs' expert agreed that, even with a urine test, if "you know something about the individual's history . . . , if you know that they are infrequent or occasional users, there is a detection time when it is reasonable that individual used the drug." The record also revealed that one of plaintiffs' experts' criticism was that the defendants' experts' conclusions did not reach the level of reliability required for the reporting of scientific

laboratory and study results. However, it appears from the depositions that the requisite scientific level is higher than the indicia of reliability required for expert testimony and opinion at trial.

Therefore, with the one exception discussed below, the trial court erred in granting the motion to exclude and motion for partial summary judgment. On summary judgment, the trial judge may not make credibility determinations. *See* La. C.C.P. art. 966; *Independent Fire Ins. Co. v. Sunbeam Corp.,* 99-2181, 99-2257, pp. 16-17 (La.2/29/2000), 755 So.2d 226, 236. Similarly, the inquiry under a *Daubert/Foret* review on summary judgment is based on undisputed material facts and "focus[es] . . . solely on principles and methodology, not on the *conclusions* that they generate." *Daubert,* 509 U.S. at 595, 113 S.Ct. at 2797; *see Independent Fire Ins. Co.,* 99-2181, 99-2257 at pp. 17, 755 So.2d at 236 (Emphasis added.). "If a party submits expert opinion evidence in opposition to a motion for summary judgment that would be admissible under *Daubert/Foret* and the other applicable evidentiary rules, and is sufficient to allow a reasonable juror to conclude that the expert's opinion on a material fact more likely than not is true, the trial judge should deny the motion and let the issue be decided at trial." *Independent Fire Ins. Co.,* 99-2181, 99-2257 at p. 17, 755 So.2d at 236.

The obvious exception to our finding of admissibility is the defendants' expert's attempted calculation of a specific quantity of marijuana in the driver's system based on data from the qualitative GC/MS test data. In this case, the GC/MS test was done only as a qualitative test; a test done to confirm the presence of a controlled substance. It was never intended to serve as a quantitative test to determine a specific amount of material present in the tested sample.

The plaintiffs' experts attacked various shortcomings in the collection, measurement, and testing of the urine sample used in the GC/MS test. The importance of these breaks in procedure are magnified when past data from a qualitative source is used to quantify. Although some scientific basis for the actual formula used for calculation was submitted, the trial court could have found that the data from the GC/MS was not gathered using the necessary procedural safeguards for quantitative testing. As a result, the data used for the calculation lacked the requisite indicia of reliability. Without a minimal level of reliability, the subsequently calculated quantification from the GC/MS data would have been more prejudicial than probative and fails to meet the requirements of *Daubert/Foret*. In summary, we find that the trial judge could have reasonably excluded the defendants' attempted quantification, but committed legal error in excluding the other probative, admissible evidence in the form of defendants' experts' opinions on the issue of marijuana use and impairment. A trial judge may not decide what expert evidence the jury should hear based on its own credibility determinations and resulting resolution of the disagreements between the experts. *Independent Fire Ins. Co.*, 99-2181, 99-2257 at pp. 16-17, 755 So.2d at 236.

The exclusion of admissible evidence may interdict a fair verdict. Thus, we must consider the effect of the erroneous exclusion of evidence on the jury verdict.

The resolution of legal cases may involve questions of fact and questions of law. Factual determinations are the sole province of the trier of fact, whether it be judge or jury. To preserve the right to a fair trial, the function of the entity that views the witnesses and hears the testimony first hand must be safeguarded. When the process of

credibility determinations and fact finding operates correctly, the factual findings are reviewed by this court using the standard of manifest or clear error. *Stobart v. State, Department of Transportation and Development,* 617 So.2d 880, 882-83 (La.1993). In other words, based on a presentation of admissible evidence, the jury may have made a factual finding different from one that would have been reached by this court, but the difference does not rise to a clearly erroneous finding upon the record. Thus, this court will not reverse based on those findings. *Rosell v. ESCO,* 549 So.2d 840, 844 (La.1989). However, if a trial judge commits legal error by denying the jury relevant, admissible evidence, the fact finding *process* is interdicted, and thus, the verdict may be "tainted." *McLean v. Hunter,* 495 So.2d 1298, 1304 (La.1986). "A legal error occurs when a trial court applies incorrect legal principles of law and such errors are prejudicial." *Evans v. Lungrin,* 97-0541, 97-0577, pp. 6-7 (La.2/6/98), 708 So.2d 731, 735. For these reasons, evidence should not be withheld from the jury, unless it clearly meets the legal requirements of exclusion.

If the exclusion of evidence tainted a jury verdict, this court steps into the shoes of the factfinder and conducts a *de novo* review of all the admissible evidence to ensure a fair trial and a fair judgment that implements the jury's verdict. *McLean,* 495 So.2d at 1304. However, a *de novo* review should not be undertaken for every evidentiary exclusion error. Unnecessary or added steps of review not only usurp the jury's function, but are a clear waste of judicial economy. Therefore, a *de novo* review should be limited to consequential errors; that is, the error prejudiced or tainted the verdict rendered. *See Evans,* 97-0541, pp. 6-7, 708 So.2d at 735. In a few cases, this court believes that a preliminary *de novo* review can be limited to

a determination of the impact of excluded evidence on the overall verdict. If it is clear from the initial limited *de novo* review that the excluded evidence could not have permissibly changed the final verdict (and thus did not taint the verdict), the jury's verdict should not be vacated and reviewed *de novo*. In the absence of a tainted verdict, the verdict is subject only to a manifest error review. *See Ruiz-Troche,* 161 F.3d at 87. Such is the case before us on the issue of the excluded evidence concerning the driver's alleged use of marijuana, and its possible consequences.

Although we find that the majority of the proffered evidence was admissible, it is clear from our review of this record that the defendants failed in their burden to prove driver impairment at the time of the accident. Certainly, they failed to prove that any alleged impairment caused this particular accident. Indeed, if the jury had made a finding of impairment based on the expert evidence on the impairment issue, it would have been manifest, clear error. The plaintiffs' attacks on the lab procedures, the limits of the available test results, and on the analogies drawn and relied on by the defendants' experts, were more than sufficient to defeat the defendants' allegations of impairment and causation. Thus, in this case, the inclusion of the rejected evidence could not have permissibly changed the jury's verdict. In the absence of a tainted verdict, a *de novo* review of the record to determine "which party should prevail by a preponderance of the evidence" is not required. *McLean,* 495 So.2d at 1304. For these reasons, the portion of the jury verdict on allocation of fault will be reviewed using the manifest, clear error standard.

JURY INSTRUCTIONS

Defendants assigned error to the trial court's failure (1) to give a jury charge on the statutory presumption provided by Louisiana Revised Statutes 32:235E, and (2) to further instruct the jury on the definition of the word "unreasonable." Based on these errors, they request a *de novo* review. Plaintiffs assert that defendants did not request a charge on the statute or object to the court's failure to further define "unreasonable." Also, plaintiffs argue that the statutory presumption was rebutted, and the trial court fully informed the jury on the concept of unreasonable risks during the initial instructions. Therefore, the trial court properly exercised its discretion and no reversible error occurred. In its reply brief, DOTD noted the pages in the record where its objections to both errors appear.

Louisiana Revised Statutes 32:235E, provides, in pertinent part, that DOTD's compliance with the "traffic control devices manual shall be prima facie evidence of discharge . . . of its obligations to the motoring public." At best, the prima facie evidence of compliance establishes a rebuttable presumption. *See* La. C.E. arts. 308 & 304.

The trial court instructs the jury on the law to be applied to the facts of the case. La. C.C.P. art. 1792. Whether to give an instruction is within the discretion of the court, and will not be disturbed absent an abuse of that discretion. *Baxter v. Sonat Offshore Drilling, Inc.*, 98-1054, p. 6 (La.App. 1 Cir. 5/14/99), 734 So.2d 901, 906. If requested by the jury after it retires, the trial court "may give" further instruction. La. C.C.P. art. 1796A & B. On appeal, the adequacy of jury instructions must be determined in the light of the jury instructions as a whole. The

discovery of an error in the instructions does not by itself justify a *de novo* review. The appellate court must measure the gravity or degree of error, while considering the instructions as a whole and the circumstances of the case. *Lincecum v. Missouri Pacific Railroad Company,* 452 So.2d 1182, 1190 (La.App. 1 Cir.), *writ denied,* 458 So.2d 476 (La.1984). A verdict should not be set aside unless the error in the instructions misled the jury to such an extent as to prevent it from doing justice. *Baxter,* 98-1054 at p. 6, 734 So.2d at 906.

After a thorough review of the record, we find that the trial court erred in failing to give the requested jury instruction on the presumption offered by Louisiana Revised Statutes 32:235E. If the evidence supported a finding that the highway department standards, or MUTCD, were followed, DOTD was entitled to the presumption. Without knowledge of the presumption, the jury could not have known to apply it if the standards were found to have been met.

However, the measure of the error, in light of the circumstances of this record, does not require setting aside the jury's verdict and a *de novo* review of the evidence on the issue of whether the highway presented an unreasonable risk of harm. The record contains disagreements between the various experts over (1) whether the MUTCD minimum standards on signage were met; and (2) whether the minimum warnings were sufficient, under the peculiar facts concerning this area of I-10. From the evidence before the jury, reasonable persons could have concluded that the MUTCD standards were not met, and that, if met, the traffic device standards were not sufficient under the particular circumstances here. Thus, no prejudicial error or injustice occurred, and we see no reversible error. Even

assuming for the sake of argument a *de novo* review was required, the result would be the same. Based on the circumstances here, an earlier, functional warning was required.

On the request for an additional explanation of the meaning of "unreasonable," we cannot say that the trial court abused its discretion. Initially, the court instructed the jury on the various applicable precepts, including an instruction on what factors may be used to determine unreasonableness. During deliberations, the jury requested an additional definition of "unreasonable." The minute entry for February 20, 2001 states that the trial court "conferred with counsel for both sides, and there was no agreement as to the definition; therefore, none was given by the court." Based on the information provided in the initial jury instructions, and the inability of the parties to agree on an additional explanation or definition, we see no abuse of the trial court's discretion.

OBJECTIONS TO WITNESS TESTIMONY AND EVIDENCE

Gillen Testimony

On the day of the accident, Mr. Michael Gillen was a Baton Rouge police officer charged with investigating the accident. During his testimony, DOTD objected and argued that Mr. Gillen was giving expert opinion testimony without having been qualified as an expert. On appeal, defendants assigned error to the trial court's failure to exclude the opinion testimony. Defendants also argued that Mr. Gillen, who worked for plaintiffs' attorneys after leaving the police department, should not have been allowed to testify on the basis of prejudice.

Louisiana Code of Evidence article 701 allows a lay witness to provide opinion testimony if (1) "[r]ationally based on the perception of the witness; and (2) [h]elpful to a clear understanding of his testimony or the determination of a fact in issue." Thus, Mr. Gillen, though not an accident reconstruction expert, could give *opinion* testimony based on his training, investigation, perception of the scene, and observation of physical evidence. *See Whetstone v. Dixon,* 616 So.2d 764, 768 (La.App. 1 Cir.1993), *writ denied,* 623 So.2d 1333 (La.1993) (rehearing granted on other grounds) (State trooper was allowed to testify on point of impact for accident.). Whether article 701 was violated or Mr. Gillen was unduly prejudiced in favor of the plaintiffs was a determination within the discretion of the trial court. *See State v. Catanese,* 368 So.2d at 983; *Belle Pass Terminal, Inc. v. Jolin, Inc.,* 92-1544, 92-1545, p. 11 (La.App. 1 Cir. 3/11/94), 634 So.2d 466, 476-77, *writ denied,* 94-0906 (La.6/17/94), 638 So.2d 1094.

The majority of Mr. Gillen's testimony related pertinent facts about the accident scene. For the most part, the portion of the testimony that could be seen as hybrid or opinion testimony met the requirements of Code of Evidence article 701. Where Mr. Gillen may have strayed into opinion beyond those codal parameters, his testimony was redundant to the testimony of plaintiffs' qualified experts. As to the claim of prejudice, the fact of prior work relationships alone is not sufficient to support a claim of collusion or unduly prejudiced testimony. Attorneys and investigators often work together on projects and in opposition on others. More importantly, defendants' questioning informed the jury of Mr. Gillen's work connections to plaintiffs' attorneys and that Mr. Gillen was no longer a police

officer. For these reasons, we see no basis for reversible error.

Bronstad Testimony

Before trial, defendants filed a motion *in limine* to exclude the opinion of plaintiffs' expert, Mr. Maurice Bronstad, on the structural character of the site of the accident. At trial, the court accepted Mr. Bronstad as an expert for plaintiffs in the area of highway safety engineering. Mr. Bronstad testified that the accident occurred on "a ramp like structure" that is actually a continuation of I-10 as opposed to defendants' characterization of a ramp approach to I-10.

In briefs to this court, defendants highlighted the record page where the testimony appears and argue that the trial court erred in denying the motion *in limine.* Specifically, defendants assert that Mr. Bronstad had no factual basis for his opinion and that the testimony did not meet the *Daubert/ Foret* standards for reliability.

Based on our thorough review of the record, we see no abuse of the discretion afforded the trial court. *See State v. Catanese,* 368 So.2d at 983. The attack on the testimony is based on an opposing description or characterization given by defendants' expert, rather than on a proven lack of scientific support or reliability.

Defendants also cited a specific portion of the trial transcript and assigned error to the trial court's failure to disallow Mr. Bronstad's irrelevant "hearsay" testimony concerning six prior accidents on the same roadway. Mr. Bronstad testified that, in preparation for trial, he reviewed six prior accident reports. Mr. Bronstad opined

that the site of the accident was prone to tractor-trailer load shift problems and rollover. However, no hearsay or relevancy objection to the testimony appears of record at the pages placed at issue by defendants. During Mr. Bronstad's testimony, the trial court refused to let photographs and reports of the accidents into evidence. Instead, the exhibits were proffered by plaintiffs. Subsequent to Mr. Bronstad's testimony, defendants discussed the same six accidents with their expert, Mr. Neil Rowan.

In response to an appellee brief arguing the lack of an objection to the testimony at issue, DOTD replied that admissibility was argued during pre-trial motions. However, the only specific citation to a record page or exhibit is to an earlier general trial objection to any discussion of the six accidents. No basis for the general objection was given, no objection to the pre-trial ruling was cited, and no reference to the pre-trial ruling was provided.

Evidentiary admissibility rulings are well within the discretion of the trial court. *See State v. Catanese,* 368 So.2d at 983; *Belle Pass Terminal, Inc.,* 92-1544, 92-1545 at p. 11, 634 So.2d at 476-77. In the absence of a contemporaneous objection *made with the grounds thereof,* this court may refuse to consider the assigned error. *See* La. C.C.P. art. 1635; *Bienvenu v. Dudley,* 95-0547, p. 8 (La.App. 1 Cir. 10/3/96), 682 So.2d 281, 286, *writs denied,* 96-2661, 96-2673 (La.12/13/96), 692 So.2d 1069, 1070. This court may also refuse to consider an argument made without specific reference to the record volume and page containing the basis for the argument. Uniform Rules-Courts of Appeal, Rule 2-12.4.

Based on our thorough review of the record, including the failure to document sufficiently the specific grounds

and ruling, and the defendants' own offered testimony on the same accidents, we see no basis for a grant of defendants' request for *de novo* review or reversible error. The complained of testimony was not contemporaneously objected to by defendants at the cited record page, the prior general objection did not state the grounds for the objection, no objection was cited to any pre-trial ruling on this matter, and the record as a whole does not support a finding that Mr. Bronstad's testimony caused a prejudicial or reversible error. A reasonable jury could have found that the character of the accident site was prone to load shift and rollover problems based on testimony and evidence surrounding the one accident at issue.

Rebuttal Testimony

On rebuttal during the trial, plaintiffs offered Mr. Gillen and another expert, Mr. James Raymond Lock, an expert in accident reconstruction and highway design. Defendants assigned error to the trial court's failure to disallow the rebuttal testimony by plaintiffs' experts. Essentially, defendants argue that the testimony was redundant of their prior testimony and not valid rebuttal testimony.

Plaintiffs are entitled to rebut the evidence and testimony offered by defendants. La. C.C.P. art. 1632(3). Evidentiary admissibility rulings are well within the discretion of the trial court. *State v. Catanese,* 368 So.2d at 983; *Belle Pass Terminal, Inc.,* 92-1544, 92-1545 at p. 11, 634 So.2d at 476-77.

Plaintiffs' experts' rebuttal testimony was generally in the same areas of their initial testimony, but was not unduly repetitious or prejudicial. The thrust of their

testimony was to rebut the evidence and opinions offered by defendants, particularly defendants' accident reconstructionist. In great part, the rebuttal testimony centered on defendants' expert's opinion on what physical evidence, found at the scene, actually related to the accident in question; a point on which the two sides disagreed. Thus, we see no abuse of discretion by the trial court.

Tickets

Defendants assigned error to the trial court's exclusion of two traffic tickets that defendants offered as evidence. Allegedly, the tickets were issued to Mr. Clark, the driver of the truck involved in the accident. The tickets were not introduced, but were proffered. Although DOTD cites in its brief to a page in the record where the trial court ruled on admissibility, the record does not contain a specific ruling excluding the tickets.

The relevancy of evidence and the effect of prejudice from the offered evidence are governed by Louisiana Code of Evidence articles 401-403. These evidentiary admissibility rulings are well within the discretion of the trial court. *State v. Catanese,* 368 So.2d at 983; *Belle Pass Terminal, Inc.,* 92-1544, 92-1545 at p. 11, 634 So.2d at 476-77. Assuming the trial court specifically ruled and excluded the tickets, our review of the record and the proffered tickets supports a ruling based on insufficient relevancy or a finding that the tickets were more prejudicial than probative. Certainly, we see no abuse of the trial court's discretion. One ticket appears to be a speeding ticket; the other is not. Neither ticket has a discernable date, nor can the essential facts of the speeding ticket be gleaned from what is a poor copy at best.

DEFECT AND ALLOCATION OF FAULT

Both sides offered testimony and evidence on the plaintiffs' allegations of an unreasonably dangerous roadway, defective by inadequate warnings and in design. Both sides presented contradictory reconstructions of how the accident occurred and its cause. In its verdict, the jury specifically found "a defect existed in I-10 that created an unreasonable risk of harm," the DOTD had notice of the defect, and that DOTD and the driver of the truck were at fault. The jury allocated 54% of the fault to DOTD and 46% to Mr. Clark.

Mrs. Wingfield, the co-plaintiffs in her suit, and defendants assigned error to the jury's allocation of fault. Defendants also assigned error to the jury's finding that DOTD was liable.

Whether a highway is unreasonably dangerous is a finding of fact reviewable under the standard of manifest error. That is, the trier of fact's findings may be set aside only if found to be clearly or manifestly wrong. *See Snearl v. Mercer,* 1999-1738, 1999-1739, p. 10 (La.App. 1 Cir. 2/16/01), 780 So.2d 563, 573, *writs denied,* 2001-1319, 2001-1320 (La.6/22/01), 794 So.2d 800, 801. Allocation of fault is a factual finding within the discretion of the trier of fact. It also is reviewed under the manifest error standard. *Snearl,* 1999-1738, 1999-1739 at p. 25, 780 So.2d at 582.

From the verdict, we do not know on what basis, whether design, signage, or both, the jury found that a defect existed. However, based on a thorough review of this record, the jury could have reasonably found as follows: (1) that a sharp lefthand curving continuation of I-10W, which necessitated an unusual 20 MPH drop in

speed on an interstate, coupled with a seemingly straight flow for motorists *exiting* onto I-110, created a hazardous driving condition; (2) that the sharpness of the curve and drop in speed would be particularly hazardous for a driver of a loaded, top heavy, double-decker cattle trailer, who was unfamiliar with the I-10W/I-110 split in Baton Rouge; (3) that prior to the actual split and entrance onto the curve, the driver's attention had been engaged by signs directing the need for choice of lanes based on destination; (4) that some signs were dirty or filmy and that an electronic warning sign placed in advance of the curve was not working on the day of the accident; (5) that the first warning of a sharp curve and significant drop in speed came at the entrance to the curving ramp; (6) that these conditions created a defect that caused an unreasonable risk of harm on the day of the accident, (7) that DOTD had notice of the defect; and (8) that DOTD was negligent in not placing an earlier, static, permanent sharp curve and speed reduction warning in advance of the split and ramp entrance. The jury could also have found that an experienced commercial cattle truck driver should have been alerted and slowed further, or appropriately responded to the unusual hazard sooner than he did; decisions that may have ameliorated the severe consequences. Thus, from our review of this particular record, we cannot say that the jury's verdict on liability was manifestly or clearly wrong. Additionally, if sitting as the fact finder, we may have allocated the fault differently, but we see no abuse of the jury's great discretion in its assessment of fault.

REALLOCATION OF FAULT BY TRIAL COURT

In the judgment dated May 2001, which was later amended and adopted by the appealed judgment of August

2001, the trial court re-allocated Mr. Clark's 46 percent of the fault to DOTD. The reallocation applied only to the Wingfield survival and wrongful death causes of actions and awards. The trial court's decision was based on the status of Mr. Wingfield and Mr. Clark as co-employees, who cannot sue each other for recovery based in tort. *See* La. R.S. 23:1032. The trial court, based on the inability of co-employees to sue each other, found that defendants, as solidary obligors with Mr. Clark, were liable for the full 100 percent of the Wingfield survival and wrongful death claims. Defendants object to the reallocation.

At the time of the accident in 1994, Louisiana Civil Code article 2324B provided, in pertinent part, as follows: "liability for damages caused by two or more persons shall be solidary only to the extent necessary for the person suffering injury, death, or loss to recover fifty percent of his recoverable damages. . . . " Additionally, the article provided that:

> Except . . . as otherwise provided by law, . . . the liability for damages caused by two or more persons shall be a joint, divisible obligation, and a joint tortfeasor shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss, regardless of such other person's . . . degree of fault, or immunity by statute or otherwise.

La. C.C. art. 2324B.

The issue here is the applicability, to named joint tortfeasors Mr. Clark and DOTD, of the statutory cap for solidary liability provided by article 2324. However, in spite of the wording of the statute, this court has held that the presence in the suit of a co-employee joint tortfeasor,

named or unnamed, brings the issue of any cap under the holding of *Cavalier v. Cain's Hydrostatic Testing, Inc.*, 94-1496 (La.6/30/95), 657 So.2d 975 (superseded by 1996 statute). *Snearl,* 1999-1738, 1999-1739 at pp. 28-31, 780 So.2d at 584-86. In *Cavalier*, the Louisiana Supreme Court held that Civil Code article 2324B did not apply to the quantification of statutorily immune non-party employers.[4] Focusing on *Cavalier*'s interpretation of article 2324B in light of Louisiana Revised Statutes 23:1032 immunity, the *Snearl* court found that *Cavalier*'s *jurisprudential exemption from the statutory cap of 50 percent must be extended to a named joint tortfeasor co-employee,* as well as non-party employers. Without the protection of the statutory cap, all the fault attributable to a co-employee may be reallocated to the non-immune tortfeasor. *Snearl,* 1999-1738, 1999-1739 at p. 31, 780 So.2d at 586.

In this case, Mr. Clark and Mr. Wingfield were co-employees.[5] Thus, Mr. Wingfield's estate and heirs may not

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[4] The Louisiana Supreme Court, in *Cavalier v. Cain's Hydrostatic Testing, Inc.,* 94-1496, pp. 9-11 (La.6/23/95), 657 So.2d 975, 982 & n. 8, acknowledged the protection of a statutory cap offered to all named joint tortfeasors by Louisiana Civil Code article 2324B, but was troubled by the inequitable result of the quantification of an unjoined employer's fault. The court explained that, upon quantification of the absent employer's fault, the employee-victim would suffer a reduction in the percentage of fault recoverable *and* a reduction from the priority of the employer's statutory lien on the recoverable proceeds. After review of the language of the codal article, the supreme court held that the pre-1996 version of article 2324B did not require quantification of the fault of a non-party employer. If employer fault could not be quantified, the third party tortfeasor had no protection under the statutory cap. *See Cavalier,* 94-1496 at pp. 12-14, 657 So.2d at 983-84.

[5] Mr. Clark and Mr. Wingfield's status as co-employees was recognized by this court in *Wingfield v. State, Department of Transportation and Development,* 97-1567, 97-1568, pp. 6-7 (La.App. 1 Cir.

(Continued on following page)

sue Mr. Clark because of the statutory immunity granted to co-employees by Louisiana Revised Statutes 23:1032. Based on their immunity status, and the inapplicability of the article 2324B cap as found by *Snearl*, DOTD may not take advantage of the 50 percent statutory cap for solidary obligors. Without the protection of article 2324B, the full amount of Mr. Clark's fault may be reallocated to DOTD. *See Snearl,* 1999-1738, 1999-1739 at p. 31, 780 So.2d at 586. With the reallocation of Mr. Clark's 46 percent, DOTD becomes responsible for 100 percent of the fault and of the award for the survival and wrongful death claims. Therefore, the reallocation of fault as set by the trial court is affirmed.

DAMAGES

Plaintiffs and defendants assigned error to one or more components of the award of damages. Specifically, defendants assert that the jury awards of $5,000,000.00 for Mr. Clark's general damages, $500,000.00 for Mrs. Gordean Wingfield's loss of consortium claim, and $1,000,000.00 to Mrs. Gordean Wingfield for the wrongful death of her husband, are excessive under Louisiana law. In their answer to the appeal, plaintiffs argue that the trial judge erred in granting defendants' motion for judgment notwithstanding the verdict (JNOV). The trial court reduced the award to Mr. Wingfield's wife and children for

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6/29/98), 716 So.2d 164, 166-167, *writ denied,* 98-2068 (La.11/06/98), 728 So.2d 395. Unfortunately for DOTD, it was denied the right to seek contribution from Mr. Clark in that case, based on La. C.C. art. 2323, and denied the protection of art. 2324 in this case.

his Civil Code article 2315.1 survival action from $800,000.00 to $500,000.00.

The trier of fact has discretion in the assessment of damages. La. C.C. art. 2324.1. On appeal, consideration of the jury's determination of damages is limited to a review for manifest error or abuse of discretion. In determining the amount of damages, the discretion vested in the trier of fact is "great." *Youn v. Maritime Overseas Corp.,* 623 So.2d 1257, 1261 (La.1993), *cert. denied, Maritime Overseas Corp. v. Youn,* 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994). The reviewing court must evaluate the particular injuries and their effects on the particular injured persons. *Reck v. Stevens,* 373 So.2d 498, 501 (La.1979). Only after a determination of an abuse of discretion or manifest error is a resort to prior awards appropriate, and then only for the purpose of determining the highest or lowest point that is reasonably within that discretion. *Youn,* 623 So.2d at 1260. If the trier of fact awarded excessive damages, the reviewing court can "disturb the award . . . only to the extent of . . . lowering it . . . to the highest . . . point which is reasonably within the discretion afforded that court." *Coco v. Winston Industries, Inc.,* 341 So.2d 332, 335 (La.1976).

Mr. Clark was not conscious at the scene, and never regained consciousness. However, the doctors at the hospital gave him pain medication in response to signs that he was experiencing pain. As a result of the accident, Mr. Clark suffered a closed head injury, fractured ribs, numerous abrasions, trauma to the right forearm, a partially detached ear, collapsed lungs, liver laceration, and a fracture of the femur. From conflicting testimony, the jury could have reasonably found that Mr. Clark may live for another 25-30 years, and was in a permanent

minimally responsive state, rather than a truly vegetative unresponsive state.

The jury awarded Mr. Clark $1,500,000.00 for past and future bodily injury and physical pain and suffering, $500,000.00 for permanent disability and disfigurement, $1,500,000.00 for past and future enjoyment of life, and $1,500,000.00 for past and future mental anguish and distress.

General damages by their nature are not susceptible of exact quantification. *Duncan v. Kansas City Southern Railway Co.,* 2000-0066, p. 13 (La.10/30/00), 773 So.2d 670, 682. And although the jury's discretion is great, on this particular record, we find (1) that the awards for bodily injury and for disability and disfigurement are somewhat duplicative, and (2) that the jury erred by awarding an excessive amount for past and future physical pain and suffering and past and future mental anguish and distress. The awards may have been sustainable for a catastrophically injured victim generally, or a victim fully aware of the drastic changes permanently affecting his life. However, the magnitude of the injuries suffered does not determine the awareness. The level of physical and mental suffering, for a minimally aware victim, is not the same for a fully cognizant victim. Having found that these awards are excessive, we reviewed the jurisprudence for guidance in setting the highest reasonable award based on the circumstances here. *See Coco,* 341 So.2d at 335. From our review of the record, in light of similar awards for serious injuries, we find the highest reasonable award for the combined categories of bodily injury, physical suffering, and mental suffering is $1,000,000.00, rather than the $3,000,000.00 awarded by the jury. *Chamberlain v. State, Department of Transportation and Development,* 91-1942R,

p. 3 (La.App. 1 Cir. 3/11/94), 633 So.2d 871, 873 (an older case with award of $600,000.00 for past and future physical and mental suffering); *compare with Snearl,* 1999-1738, 1999-1739 at pp. 3 & 35-36, 780 So.2d at 569 & 589 (an award of $2,000,000.00 for past and future physical and mental suffering to a fully aware victim with catastrophic injuries) and *Brown v. Glaxo, Inc.* 99-1531, p. 11 (La.App. 1 Cir. 11/15/00), 790 So.2d 35, 43, *writs denied,* 2000-3457, 2001-0035 (La.2/09/01), 785 So.2d 827, 832 (Plaintiff in vegetative state received no award for physical and mental pain and suffering.). Therefore, we reduce the award for the combined categories of bodily injury and physical and mental suffering to $1,000,000.00. Thereby, the total general damages award is reduced from $5,000,000.00 to $3,000,000.00.

Mr. and Mrs. Wingfield had been married about 27 years at the time of his death; her third marriage and his second. Mr. Wingfield spent a lot of time on the road as a truck driver, but, by all accounts, they had a loving and close relationship. When he died, Mr. Wingfield was 60 years old. He had a worklife expectancy of 2.39 years. Based on her wrongful death claim under Louisiana Civil Code article 2315.2, Mrs. Wingfield was awarded $1,000,000.00 for the death of her husband and $70,000.00 for loss of support. The medical and funeral expenses were awarded separately.

Wrongful death claims do "not arise until the victim dies and it compensates" the claimants for their own injuries suffered after the death of the victim. *Taylor v. Giddens,* 618 So.2d 834, 840 (La.1993). The elements of the award for wrongful death include loss of love, affection, companionship, support, and funeral expenses. *Gibson v. State, Department of Transportation and*

Development, 95-1418, 95-1419, p. 14 (La.App. 1 Cir. 4/4/96), 674 So.2d 996, 1006, *writs denied,* 96-1862, 96-1895, 96-1902 (La.10/25/96), 681 So.2d 373, 374.

Funeral expenses were separately awarded and not challenged. To the extent that the loss of support element of the total wrongful death award was challenged, $70,000.00 is well within the discretion of the jury. From our review of the different expert opinions on the issue, we see no abuse.

As to the award of $1,000,000.00 for the other elements of the wrongful death claim, the award is excessive under the facts of this record. It is possible that the jury may have been affected by the severity of Mr. Wingfield's injuries and tragic death before his wife and family arrived to comfort him. Such injuries and suffering are elements of the survival action. *See* La. C.C. art. 2315.2; *Taylor,* 618 So.2d at 840. If the jury considered such elements, it erred. However, regardless of the actual reasons for the unusually high death award, the jury abused its discretion by awarding $1,000,000.00. Considering all the relevant factors, the closeness of the relationship, Mr. Wingfield's age, his time away from home, and the length of the marriage, in light of prior valid awards under similar circumstances, $500,000.00 is the highest reasonable award possible at the time of trial. *See Gibson,* 95-1418, 95-1419 at pp. 14-15, 674 So.2d at 1006 (Close relationship and difficulty of wife in recovering from the death of her spouse was considered in award of $350,000.00.); *Rick v. State, Department of Transportation and Development,* 93-1776, 93-1784 pp. 13-14 (La.1/14/94), 630 So.2d 1271, 1277 (Supreme court considered the fact that couple worked together everyday in family business as grounds for reinstating trier of fact's award of

$400,000.00.); *Faucheaux v. Terrebonne Parish Consolidated Government,* 625 So.2d 683, 685 (La.App. 1 Cir.1993) (Loving relationship and 27 year marriage were factors considered in affirming award of $300,000.00.)

Therefore, we affirm the loss of support component, but reduce the death award to $500,000.00, for a total wrongful death award of $570,000.00. We amend the judgment accordingly.

Generally, loss of consortium claims by parents are calculated based on loss of love and affection, loss of companionship, loss of material services and financial support, and loss of aid and assistance. *Snearl,* 1999-1738, 1999-1739 at p. 40, 780 So.2d at 591-92. Certainly Mrs. Wingfield had a loving relationship with her son, and due to his permanent status of minimal responsiveness, she lost the former level of companionship that they enjoyed. However, Mr. Clark had not lived with his mother for several years, and they had not enjoyed a long-term, daily relationship; nor did Mr. Clark provide significant assistance, material services, or financial support to his mother. For these reasons, we find that an award of $500,000.00 was excessive. The highest possible award for loss of consortium under the facts here is $200,000.00. *See Snearl,* 1999-1738, 1999-1739 at pp. 40-42, 780 So.2d at 591-93 (and cases cited therein). Therefore, the judgment must be amended to reflect the reduction from $500,000.00 to $200,000.00 for Mrs. Wingfield's loss of consortium claim.

The standard of review for a JNOV on appeal is a two-part inquiry. In reviewing a JNOV, the appellate court must first determine if the trial court erred in granting the JNOV. This is done by the reviewing court using the same

criteria used by the trial judge to decide whether to grant the motion. *Joseph v. Broussard Rice Mill, Inc.*, 2000-0628, p. 5 (La.10/30/00), 772 So.2d 94, 99. In other words, considering all the evidence in the light most favorable to the party opposing the motion for JNOV, do the facts and inferences point so strongly and overwhelmingly in favor of the moving party that reasonable persons could not reach different conclusions? *Smith v. Davill Petroleum Company, Inc.*, 97-1596, p. 4 (La.App. 1 Cir. 12/09/98), 744 So.2d 23, 27. "If the answer to that question is in the affirmative, then the trial judge was correct in granting the motion. If, however, reasonable persons in the exercise of impartial judgment might reach a different conclusion, then it was error to grant the motion and the jury verdict should be reinstated." *Joseph*, 00-0628 at p. 5, 772 So.2d at 99. If we determine that the trial court correctly applied its standard of review as to the jury verdict, the appellate court reviews the JNOV using the manifest error standard of review. *Smith v. Davill Petroleum Co., Inc.*, 97-1596 at pp. 4-5, 744 So.2d at 27.

On plaintiffs' claim that the JNOV was granted in error, we agree. Severity and duration of the pain and suffering are valid considerations in assessing pain and suffering. *Fleniken v. Entergy Corporation*, 2000-1824, 2000-1825, p. 29 (La.App. 1 Cir. 2/16/01), 780 So.2d 1175, 1194, *writs denied*, 2001-1268, 2001-1305, 2001-1317 (La.6/15/01), 793 So.2d 1250, 1253, 1254. From the dynamics of this accident, Mr. Wingfield suffered one complete amputation and one crushed leg, with partial amputation. He suffered severe chest injuries and other serious injuries such as several fractured ribs and massive bleeding throughout his body, including the brain and kidneys. He was conscious at the scene, where, amidst an horrific sight

of truck and cattle parts and sound of injured cattle thrashing, he lay on the highway awaiting transport. Several times, Mr. Wingfield asked about Mr. Clark's condition. The movement from the ground to the ambulance was extremely painful. At the hospital, Mr. Wingfield survived for approximately three hours. He was conscious for much of the time from the accident until his death. He repeatedly expressed concern about Mr. Clark, who was his stepson, and asked for his wife. Unfortunately, his wife and family were not able to reach the hospital and provide comfort before Mr. Wingfield succumbed to his injuries. Dr. Alfredo Suarez, who performed the autopsy, testified that the injuries were some of the most severe he had seen in his career, and he opined that Mr. Wingfield suffered "quite a bit" of pain.

Considering all the evidence in the light most favorable to the plaintiffs, the facts and inferences do not point so strongly and overwhelmingly in favor of defendants that reasonable persons could not have reached different conclusions on the amount of damages. Based on the traumatic accident, the particularly egregious injuries, the level of pain and suffering, and the time of survival for this particular victim, the jury awarded $800,000.00 for Mr. Wingfield's survival action for pain and suffering. Although the amount awarded in 2001 by the jury may have been at the highest end of a reasonable range, we cannot say that reasonable persons, under the specific facts of this case, could not have reached such a conclusion. *See Strawder v. Zapata Haynie Corporation,* 94-453, 94-454, pp. 3-5 (La.App. 3 Cir. 11/02/94), 649 So.2d 554, 558-59 (An award of $500,000.00 for pain and suffering, experienced after an explosion for a period of thirty minutes until death, was held not excessive.); *Randall v.*

Chevron U.S.A., Inc., 13 F.3d 888, 892 & 901-02 (5th Cir.1994), *modified on other grounds*, 22 F.3d 568 (5th Cir.1994), *cert. dismissed sub nom., Sea Savage, Inc. v. Chevron U.S.A., Inc.*, 512 U.S. 1265, 115 S.Ct. 5, 129 L.Ed.2d 906 (1994), and *cert. denied sub nom.*, 513 U.S. 994, 115 S.Ct. 498, 130 L.Ed.2d 408 (1994) (Award of $500,000.00 was given by circuit court for pain and suffering for accident in which mechanic fell overboard and clung to barnacle infested oil platform leg for twenty-five minutes before drowning.). Thus, we find that the trial court erred in granting the JNOV. For these reasons, we reverse the grant of the JNOV, and reinstate the jury verdict of $800,000.00.

REVERSIONARY MEDICAL TRUST FOR FUTURE MEDICAL EXPENSES

Mrs. Wingfield, and the co-plaintiffs in her suit (Wingfield plaintiffs), assigned error to the trial court's creation of a reversionary trust for the jury's award of $4,000,000.00 to Mr. Clark for his future medical expenses. The Wingfield plaintiffs argue that Louisiana Revised Statutes 13:5106 B (enacted after the date of the accident and filing of the suit) effected a substantive change in the amount of damages awarded, and thus could not be applied retroactively[6] to this case. Secondly,

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[6] *See* La. C.C. art. 6; La. R.S. 1:2. In the absence of the express intent of retroactivity required by Louisiana Revised Statutes 1:2, the reviewing court must then classify the statutory provision in question as substantive, procedural, or interpretive. Procedural and interpretive laws that do not create new rights or duties, or change existing ones, may be applied retroactively. *Genusa v. Dominique*, 97-0047, pp. 8-11 (La.App. 1 Cir. 2/20/98), 708 So.2d 784, 790-91.

Louisiana Revised Statutes 13:5114B(4) (in effect at the time of the accident and the filing of the suit)[7] abrogated Mr. Clark's and his heirs' vested right in Mr. Clark's award for future medical expenses. Therefore, Louisiana Revised Statutes 13:5114B(4) was unconstitutional. Alternatively, if the statute was not unconstitutional, the statute applied only to judge trials and not to the jury award at issue here.

Both statutes provide for the creation of a reversionary trust for future medical expenses. Upon the death of the injured person, any funds remaining would revert to the public entity that established the trust. La. R.S. 13:5106B(3)(b); 5114B(4) (pre-1996 version). Another section of Louisiana Revised Statutes 13:5114 provided that the trial court could select a structured payment plan for future economic damages awarded by the judge to an injured person. La. R.S. 13:5114D(1)(a). However, the provisions for the structured payment plan are different from those governing the reversionary trust.[8] Unlike the reversionary clause triggered by the death of the injured person, the structured payment "plan shall not operate to relieve the public entity from liability for the future payments unless and until all future payments have been made." La. R.S. 13:5114D(1)(b). Even assuming the reference to judge-made awards applied to reversionary trusts, it is clear from the statutory scheme in effect at the time

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[7] The version of Louisiana Revised Statutes 13:5114 at issue here is the statute in effect before its repeal by Acts 1996, 1st Ex.Sess., No. 63. The current version of section 5114 does not provide for reversionary trusts.

[8] Similarly, we are not convinced by the argument that the creation of reversionary trusts is limited by a cap provided for settlements or compromises governed by section 5114 C(1) & (2).

that the word "judge" referred to the trier of fact, and was not meant to provide a specific exemption to jury awards. At the time of the passage of section 5114, Louisiana Revised Statute 13:5105 provided that suits against the state could only be tried by a judge. The goal of the legislation was to protect the public fisc by providing for structured payment plans. Its intent was not to differentiate between awards made by a jury and those granted by a judge. La. R.S. 13:5114A.

Although we do not believe that section 5106B(3) effects a substantive change, section 5106B(3) provides for reversionary trusts only in suits against political subdivisions of the state. La. R.S. 13:5106B(3)(a) & (b). In a suit against the state or a state agency, the future medical benefits must be paid from the Future Medical Care Fund. La. R.S. 13:5106B(3)(c). In written reasons, the trial court referenced both statutes, but may have incorrectly cited to section 5106 for the creation of a reversionary trust. For use by the state in the form of DOTD, section 5114 provided the discretionary authority for the trial court's creation of a reversionary trust.

In written reasons filed in the record, the trial court opined that the trust does not limit the amount of damages due the victim, Mr. Clark, because, when the trust terminates, the victim's need for medical expenses no longer exists. We agree. As applied to this victim-plaintiff, the creation of a reversionary trust does not derogate a *substantive or vested right in actual damages suffered or incurred by the victim.* The state's liability for tort damages is not waived; the state is still liable for all of the victim's medical expenses. Neither does a reversionary trust for medical benefits set a ceiling on damages. All medical expenses will be paid, and thus, the actual

damages incurred will not be reduced. For these reasons, the creation of a reversionary trust does not effect a substantive change. Based on the same analysis, section 5114B(4), as applied here, would not be an unconstitutional limitation of the state's liability that was prohibited at the time of this pre-1996 accident and suit. *See Chamberlain v. State, Department of Transportation and Development,* 624 So.2d 874 (La.1993) (superseded by 1995 Constitutional Amendment).

A plaintiff must prove the need for future medical benefits or expenses. *Duncan,* 2000-0066 at p. 17, 773 So.2d at 685. However, because the award must be made at the time of the trial, but before the services and payments are actually needed or incurred, the trier of fact must make an award based on speculation, including the life expectancy of the victim. To allow such an award to be deemed a property right, regardless of the amount of medical expenses or "damages" actually incurred in the future, would be an abuse of the very system that allows speculative awards in an effort to help an injured victim. The goal of the reversionary trust is not to limit actual damages, meaning the expenses incurred or owed. The creation of the trust does not deprive the victim of medical treatment or care. The trust only terminates after the need for medical care and treatment ends. After death, no new expenses can be incurred; thus, no damages are due or owed to the victim.[9]

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[9] Obviously, expenses incurred before death may be billed after death. Those bills would be payable, as would bills for services reasonably and necessarily contracted for on a monthly or longer time basis, when reimbursement is not customarily paid after the death of the

(Continued on following page)

The medical trust operates to the benefit of the victim and ensures that the necessary funds for care and treatment remain available during the time of need, the life of the victim. The trust provides protection to the victim for what is arguably the single most important item of damages for Mr. Clark. For example, the victim's family may feel that their investment plans for the award are prudent and will ensure future needs, but if a mistake is made, the payment for future medical services may be endangered or lost completely. Additionally, the trust does not substantively affect or reduce any rights of the families. The families have no vested right in damages that never come into being. After the death of the victim, no new "damages" for medical care or treatment expenses can be incurred. Certainly the victim's estate is responsible for the victim's debts, the due and payable medical expenses incurred. However, once those debts are paid, no new expenses or "damages" due the victim can arise. After death, the funds in the trust, which had only the potential of becoming damages due the victim, do not become part of the estate. Instead, those funds revert to the state. To find otherwise, would be akin to holding that from the estate's obligation to pay credit card debts, flows the heirs' rights to inherit the unused personal credit line from the same card.[10]

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victim. It is the need by the victim at the time the services or treatment are incurred or contracted for that changes speculative, potential damages into actual expenses and therefore recoverable damages.

[10] Arguably, the obligation imposed on a tortfeasor to pay medical expenses is in general an obligation owed only to the victim; a personal obligation, and not heritable. The payment for medical services and "performance [of medical services] is for the exclusive benefit of the recipient of such services." 1 Saul Litvinoff, Obligations § 4.13, at 62, in

(Continued on following page)

While protecting the victim's benefits, the trust also ensures the integrity and stability of public finances by preventing the use of public funds in payment of potential state liabilities that never accrue. If damages in the form of medical expenses are not and cannot be incurred by the intended recipient, the use of state funds can no longer be approved. For these reasons, we see no error in the trial court's creation of a reversionary trust for the future medical expenses. Thus, we affirm the creation of the trust in favor of Mr. Clark.

COSTS

In the judgment of May 25, 2001, the trial court assessed 66% of the taxable costs to DOTD. Plaintiffs argue that only Mr. Clark was found to have been at fault. Thus, the other plaintiffs are free of fault and should not have to share in the payment of any costs of court. The "court may render judgment for costs, or any part thereof, against any party, as it may consider equitable." La. C.C.P. art.1920. From our review of this particular record, we see no abuse of the trial court's discretion in its division of the costs between the parties. The trial court is in a much better position to decide how the costs in such a complex and actively contested case should be apportioned.

For the foregoing reasons, the JNOV is reversed, and the jury's award of $800,000.00 for the Wingfield survival action is reinstated. The $500,000.00 loss of consortium award to Mrs. Wingfield is reduced to $200,000.00; the

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5 Louisiana Civil Law Treatise (2001); *see* La. C.C. arts. 1765-66. However, that reasoning is unnecessary here.

total Wingfield wrongful death award is reduced from $1,070,000.00 to $570,000.00; and the award of general damages to Mr. Clark is reduced from $5,000,000.00 to $3,000,000.00. As amended, the remainder of the judgment is affirmed.

The plaintiffs in both consolidated cases shared issues and worked jointly on the appeal and their answers to the appeal. Thus, the costs of the appeal for both cases, $36,649.15, are assessed as one-half to plaintiffs and one-half to defendants-appellants.

REVERSED IN PART, AMENDED, AND AS AMENDED, AFFIRMED IN PART.

GAIDRY, J., agrees and assigns additional reasons.

GAIDRY, J., agrees and assigns additional reasons.

I join in all of the well-reasoned conclusions reached by the majority herein, with the following additional reasons.

My review of the trial court's oral reasons for judgment does not reveal any basis for a conclusion that the court made a credibility determination in granting the motion *in limine* to exclude the testimony of the defense experts on the marijuana test results. Although not articulated in as precise a fashion as they could have been, the trial court's reasons address the considerations of scientific validity under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and its progeny, and the practical interplay of La. C.E. arts. 403 and 702 in the exercise of the trial court's sound discretion. The trial court obviously concluded that although the opinion testimony offered and the scientific methodology upon which it was based met the

threshold criteria required for admission, its substantive content simply was not sufficiently probative on the issue of contributory negligence to outweigh the very real danger of unfair prejudice under art. 403. The evidence before the trial court on the issue supports the conclusion that the trial court did not abuse its discretion as gatekeeper in granting the motions related to that evidence and its related defense. Accordingly, it is unnecessary for us to reach the issue of whether any claimed error in that regard prejudiced the verdict and to undertake a preliminary or limited *de novo* review. The ultimate result reached on that assignment of error, however, is correct.

GORDEAN ADELLA WINGFIELD, ET AL	*	NUMBER 418,074 SECTION 15
VERSUS	*	19TH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, WILSON TRAILER COMPANY, INC.	*	PARISH OF EAST BATON ROUGE
	*	STATE OF LOUISIANA

CONSOLIDATED WITH

JACKIE MURRAY, SHARON ROY ROYNER, IVY J. WILLS AS LEGAL GUARDIAN AND ATTORNEY FOR JOSEPH EDWARD WINGFIELD, AND JOSEPH EDWARD WINGFIELD INDIVIDUALLY	*	NUMBER 418,842 SECTION 12
	*	19TH JUDICIAL DISTRICT COURT
VERSUS		
STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, WILSON TRAILER COMPANY, INC.	*	PARISH OF EAST BATON ROUGE
	*	STATE OF LOUISIANA

FINAL JUDGMENT

(Filed Aug. 14, 2000)

On July 28, 2000, oral argument regarding DOTD's and National Union's Motions for Summary Judgment on Federal Preemption of Louisiana Tort Law, was heard in open court; present were:

Stacey Moak and Doug Chapoton, representing State of Louisiana, Through the Department of Transportation and Development;

Robert Kleinpeter, representing Jackie Murray, Sharon Roy Royner, Ivy J. Wills as legal guardian and attorney for Joseph Edward Wingfield, and Joseph Edward Wingfield individually; and

Charles R. Moore and J. E. Cullens, Jr, representing Gordean Adella Wingfield, individually, and as guardian and conservator of her major son, Kenny Clark, and Saratina Wingfield, Jason Eric Wingfield, and Joshua Elliot Wingfield.

David F. Bienvenu, HOFFMAN, SIEGEL, SEYDEL, BIENVENU & CENTOLA, attorneys for defendant, National Union Fire Insurance of Pittsburgh, Pa.

After considering the written motions, attachments to all written motions, and oral argument of counsel.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Motions for Summary Judgment on Federal Preemption of Louisiana Tort Law filed by the State of Louisiana, DOTD and National Union fire Insurance Company of Pittsburgh, Pennsylvania, regarding the Federal Preemption, is denied.

IT IS FURTHER ordered that Defendants are cast for all costs of these motions.

JUDGMENT RENDERED in open court on July 28, 2000.

JUDGMENT SIGNED in Baton Rouge, Louisiana, this 16 day of August, 2000.

/s/ J. Michael McDonald
JUDGE, 19TH JUDICIAL
DISTRICT COURT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served, via U.S. First Class Mail, postage prepaid, to the following counsel of record:

Mr. Stacey Moak
Stacey Moak & Associates
11816 Sunray Avenue, Suite A
Baton Rouge, LA 70816-2384

Mr. Robert E. Kleinpeter
Kleinpeter, Schwartzberg
& Stevens
619 Jefferson Highway, Suite 2H
Baton Rouge, LA 70806

David F. Bienvenu
Nathan L. Schrantz
Hoffman, Siegel, Seydel,
Bienvenu & Centola
650 Poydras Street,
Suite 2100
New Orleans, LA 70130

on this 14th day of AUGUST, 2000.

I HEREBY CERTIFY THAT ON THIS DAY A COPY OF THE WRITTEN REASONS FOR JUDGMENT/ DISMISSAL/ JUDGMENT/ ORDER/ WAS MAILED BY ME, WITH SUFFICIENT POSTAGE AFFIXED TO:

DONE AND SIGNED ON 8-16-00

/s/ [Illegible]
DEPUTY CLERK OF COURT

/s/ J. E. Cullens, Jr.
Charles R. Moore
J. E. Cullens, Jr.
/s/ Kleinpeter
/s/ Fornais
/s/ Moak
/s/ Moore
/s/ Bienvenu

GORDEAN ADELLA WINGFIELD, ET AL	* NUMBER 418,074 SECTION 15
VERSUS	* 19TH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, WILSON TRAILER COMPANY, INC.	* PARISH OF EAST BATON ROUGE * STATE OF LOUISIANA

CONSOLIDATED WITH

JACKIE MURRAY, SHARON ROY ROYNER, IVY J. WILLS AS LEGAL GUARDIAN AND ATTORNEY FOR JOSEPH EDWARD WINGFIELD, AND JOSEPH EDWARD WINGFIELD INDIVIDUALLY	* NUMBER 418,842 SECTION 12 * 19TH JUDICIAL DISTRICT COURT
VERSUS	
STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, WILSON TRAILER COMPANY, INC.	* PARISH OF EAST BATON ROUGE * STATE OF LOUISIANA

JUDGMENT

(Filed Jan. 3, 2001)

On December 21, 2000, oral argument was heard in open court regarding the following motions:

1. **Plaintiffs'** Joint Motion In Limine to Exclude Expert Testimony of Thomas Kurt, M.D. and Gary Wimbish, Ph.D. Following a

LSA-C.E. Art. 104 Hearing, and All Evidence Regarding Marijuana;

2. **Plaintiffs'** Joint Motion for Partial Summary Judgment as to DOTD's Affirmative Defense of Comparative Negligence for Driving Under The Influence of Marijuana;

3. **Defendant's** Motion for Summary Judgment on the Issue of the Breach of Duty of Kenny Clark;

4. **Defendant's** Motion in Limine on Drug Testing Procedure used on Kenny Clark's Sample; and

5. **Plaintiff's** Joint Motion to Assess Expert Expenses Against DOTD.

Present were:

Stacey Moak & Douglas M. Chapoton, representing State of Louisiana, Through the Department of Transportation and Development ("DOTD");

David F. Bienvenu, and Brynn M. Baiamonte, representing National Union Fire Insurance Company

J. E. Cullens, Jr., and Charles P. Moore, representing Gordean Adella Wingfield, individually, and as guardian and conservator of her major son, Kenny Clark, and Saratina Wingfield, Jason Eric Wingfield, and Joshua Elliot Wingfield; and

Robert Kleinpeter, representing Jackie Murray, Sharon Roy Royner, Ivy J. Wills as legal guardian and attorney for Joseph Edward Wingfield, and Joseph Edward Wingfield individually.

After considering the written motions, attachments to all written motions, the live expert testimony presented in open court on December 11, 12, and 13, 2000, all exhibits presented to the court, and oral argument of counsel, the Court ruled as follows:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the joint Motion In Limine to Exclude Expert Testimony of Thomas Kurt, M.D. and Gary Wimbish, Ph.D. Following a LSA-C.E. Art. 104 Hearing, and All Evidence Regarding Marijuana, filed herein by plaintiffs, is **GRANTED**; the expert testimony of Drs. Kurt and Wimbish is hereby excluded in its entirety from trial; and all evidence regarding marijuana use by Kenny Clark, whether documentary or otherwise and however characterized, is hereby excluded in its entirety from trial;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Joint Motion for Partial Summary Judgment as to DOTD's Affirmative Defense of Comparative Negligence for Driving Under The Influence of Marijuana, filed hereby by plaintiffs, is **GRANTED**; defendants' affirmative defense of comparative negligence for driving under the influence of marijuana is hereby dismissed with prejudice; and all evidence regarding marijuana use by Kenny Clark, whether documentary or otherwise and however characterized, is hereby excluded in its entirety from trial;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Motion for Summary Judgment on the Issue of the Breach of Duty of Kenny Clark, filed herein by DOTD, is **DENIED**;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Motion in Limine on Drug Testing

Procedure Used on Kenny Clark's Sample, filed herein by DOTD, is **GRANTED**;

IT IS FURTHER ORDERED that the Joint Motion to Assess Expert Expenses Against DOTD, filed herein by plaintiffs, has been taken under advisement.

JUDGMENT RENDERED in open court on December 21, 2000.

JUDGMENT SIGNED in Baton Rouge, Louisiana, this 10 day of January, 2001.

/s/ J. Michael McDonald
JUDGE MICHAEL McDONALD

I HEREBY CERTIFY THAT ON THIS	/s/ Kleinpeter
DAY A COPY OF THE WRITTEN	/s/ Fornais
REASONS FOR JUDGMENT/ DIS-	/s/ Moak
MISSAL/ JUDGMENT/ ORDER/	/s/ Moore
WAS MAILED BY ME, WITH SUFFI-	/s/ Bienvenu
CIENT POSTAGE AFFIXED TO:	/s/ Creed

DONE AND SIGNED ON 1-12-01

/s/ [Illegible]
DEPUTY CLERK OF COURT

Respectfully Submitted
After Review of All Counsel:

/s/ J.E. Cullens, Jr.
Charles R. Moore, La. Bar Roll No. 9604
J.E. Cullens, Jr., La. Bar Roll No. 23011
MOORE, WALTERS & THOMPSON
6513 Perkins Road
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served, via U.S. First Class Mail, postage pre-paid, to the following counsel of record:

Mr. Stacey Moak
Stacey Moak & Associates
11816 Sunray Avenue, Suite A
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Mr. Robert E. Kleinpeter
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& Stevens
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David F. Bienvenu
Nathan L. Schrantz
Hoffman, Siegel, Seydel,
Bienvenu & Centola
650 Poydras Street,
Suite 2100
New Orleans, LA 70130

on this 3d day of January, 2001.

/s/ J. E. Cullens, Jr.
Charles R. Moore
J. E. Cullens, Jr.

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

GORDEAN ADELLA WINGFIELD, INDIVIDUALLY AND AS GUARDIAN AND CONSERVATOR OF THE ESTATE OF HER MINOR SON, KENNY CLARK

NO. 00 CW 1917

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, AND WILSON TRAILER COMPANY, INC.

CONSOLIDATED WITH

JACKIE MURRAY, SHARON ROY ROVNER, IVY J. WILLS AS LEGAL GUARDIAN AND ATTORNEY FOR JOSEPH EDWARD WINGFIELD, AND JOSEPH EDWARD WINGFIELD INDIVIDUALLY

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, WILSON TRAILER COMPANY, INC.

OCT 23 2000

In re: State of Louisiana, through the Department of Transportation and Development, applying for supervisory writ, 19th Judicial District Court, Parish of East Baton Rouge, No. 418,074 c/w 418,842, Division "H".

WRIT NOT CONSIDERED. Relator has failed to comply with Uniform Rules – Courts of Appeal, Rule 4-5(h) by failing to include a copy of the petition in this suit, as well as the answer in response thereto. In order for this Court to examine whether the trial court properly denied the motion for summary judgment, it must be presented with a copy of the pleadings reviewed by the trial court.

Supplementation of this writ application and/or an application for rehearing will not be considered. Uniform Rules – Courts of Appeal, Rules 4-9 and 2-18.7.

Any new application must be received by this Court within fourteen days of this order, and must contain a copy of this ruling.

RHP
BMF
JMB

COURT OF APPEAL, FIRST CIRCUIT

/s/ Peggy T. Landry
DEPUTY CLERK OF COURT
FOR THE COURT

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

GORDEAN ADELLA WINGFIELD, INDIVIDUALLY AND AS GUARDIAN AND CONSERVATOR OF THE ESTATE OF HER MINOR SON, KENNY CLARK

NO. 00 CW 2568

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, AND WILSON TRAILER COMPANY, INC.

CONSOLIDATED WITH

JACKIE MURRAY, SHARON ROY ROVNER, IVY J. WILLS AS LEGAL GUARDIAN AND ATTORNEY FOR JOSEPH EDWARD WINGFIELD, AND JOSEPH EDWARD WINGFIELD INDIVIDUALLY

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, WILSON TRAILER COMPANY, INC.

NOV 16 2000

In re: The State of Louisiana, through the Department of Transportation and Development, applying for expedited consideration and a stay of the trial, 19th Judicial District Court, Parish of East Baton Rouge, No. 418,074 c/w 418,842.

REQUEST FOR EXPEDITED CONSIDERATION DENIED; STAY DENIED.

DWL
VGW
JEK

COURT OF APPEAL, FIRST CIRCUIT

/s/ Peggy T. Landry
DEPUTY CLERK OF COURT
FOR THE COURT

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

GORDEAN ADELLA WINGFIELD, INDIVIDUALLY AND AS GUARDIAN AND CONSERVATOR OF THE ESTATE OF HER MINOR SON, KENNY CLARK

NO. 2000 CW 2568

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, AND WILSON TRAILER COMPANY, INC.

January 31, 2001

CONSOLIDATED WITH

JACKIE MURRAY, SHARON ROY ROYNER, IVY J. WILLS AS LEGAL GUARDIAN AND ATTORNEY FOR JOSEPH EDWARD WINGFIELD, AND JOSEPH EDWARD WINGFIELD INDIVIDUALLY

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, AND WILSON TRAILER COMPANY, INC.

In re: State of Louisiana, through the Department of Transportation and Development, applying for supervisory writs, 19th Judicial District Court, Parish of East Baton Rouge, Docket Number 418,074 consolidated with Docket Number 418,842.

WRIT DENIED.

JEK
RDD
RHP

COURT OF APPEAL, FIRST CIRCUIT

/s/ Dana S. Hill
DEPUTY CLERK OF COURT
FOR THE COURT

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

GORDEAN ADELLA WINGFIELD, INDIVIDUALLY AND AS GUARDIAN AND CONSERVATOR OF THE ESTATE OF HER MINOR SON, KENNY CLARK

NO. 2001 CW 01228

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, AND WILSON TRAILER COMPANY, INC.

CONSOLIDATED WITH

JACKIE MURRAY, SHARON ROY ROVNER, IVY J. WILLS AS LEGAL GUARDIAN AND ATTORNEY FOR JOSEPH EDWARD WINGFIELD, AND JOSEPH EDWARD WINGFIELD INDIVIDUALLY

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, AND WILSON TRAILER COMPANY, INC.

JAN 31 2001

In re: State of Louisiana, through the Department of Transportation and Development and National Union Insurance Company of Pittsburgh, Pennsylvania, applying for Supervisory Writs, 19th Judicial District Court, Parish of East Baton Rouge, No. 418,074 c/w 418,842.

WRIT DENIED. This court declines to exercise its supervisory jurisdiction. The criteria set forth in **Herlitz Construction Company, Inc. v. Hotel Investors of New Iberia, Inc.,** 396 So.2d 878 (La. 1981), are not met. Moreover, insofar as relator seeks review of the grant of a partial motion for summary judgment, this court declines to exercise supervisory jurisdiction over matters that fall under La. C.C.P. art. 1915 but have not qualified for an immediate appeal thereunder.

RDD
RHP
JEK

COURT OF APPEAL, FIRST CIRCUIT

/s/ Dana S. Hill
DEPUTY CLERK OF COURT
FOR THE COURT

784 So.2d 650

Supreme Court of Louisiana.

Gordean Adella WINGFIELD, Individually and as Guardian and Conservator of the Estate of Her Minor Son, Kenny Clark

v.

STATE of Louisiana Through DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, and Wilson Trailer Company, Inc.

Jackie Murray, Sharon Roy Rovner, Ivy J. Wills as Legal Guardian and Attorney for Joseph Edward Wingfield, and Joseph Edward Wingfield Individually,

v.

State of Louisiana, Through the Department of Transportation and Development, Wilson Trailer Company, Inc.

No. 2001-CC-0334.

Feb. 6, 2001.

In re: National Union Fire Insurance Company of Pittsburgh; State of Louisiana et al.; Department of Transportation and Development; – Defendant(s); Applying for Supervisory and/or Remedial Writs, Parish of E. Baton Rouge, 19th Judicial District Court Div. H, Nos. 418,074, 418,842; to the Court of Appeal, First Circuit, No. 2001 CW 0122.

Denied.

VICTORY, J., would grant the writ.

784 So.2d 651

Supreme Court of Louisiana.

Gordean Adelia WINGFIELD, Individually and as Guardian and Conservator of the Estate of Her Minor Son, Kenny Clark

v.

STATE of Louisiana, Through DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT and Wilson Trailer Company, Inc.

Jackie Murray, Sharon Roy Rovner, Ivy J. Wills as Legal Guardian and Attorney For Joseph Edward Wingfield, and Joseph Edward Wingfield Individually

v.

State of Louisiana, Through The Department of Transportation and Development, Wilson Trailer Company, Inc.

No. 2001-CC-0335.

Feb. 6, 2001.

In re: State of Louisiana et al.; Department of Transportation and Development; – Defendant(s); Applying for Supervisory and/or Remedial Writs, Parish of E. Baton Rouge, 19th Judicial District Court Div. H, Nos. 418,074, 418,842; to the Court of Appeal, First Circuit, No. 2000 CW 2568.

Denied.

GORDEAN ADELLA WINGFIELD, ET AL	* NUMBER 418,074 SECTION 15
VERSUS	* 19TH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, WILSON TRAILER COMPANY, INC.	* PARISH OF EAST BATON ROUGE
	* STATE OF LOUISIANA

CONSOLIDATED WITH

JACKIE MURRAY, SHARON ROY ROYNER, IVY J. WILLS AS LEGAL GUARDIAN AND ATTORNEY FOR JOSEPH EDWARD WINGFIELD, AND JOSEPH EDWARD WINGFIELD INDIVIDUALLY	* NUMBER 418,842 SECTION 12
	* 19TH JUDICIAL DISTRICT COURT
VERSUS	
STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, WILSON TRAILER COMPANY, INC.	* PARISH OF EAST BATON ROUGE
	* STATE OF LOUISIANA

FINAL JUDGMENT

Following a full trial, conducted pursuant to applicable Louisiana law, the twelve member jury, empaneled on February 5, 2001, rendered a special verdict on February 21, 2002. Present at trial were:

> Charles R. Moore and J. E. Cullens, Jr., attorneys for Gordean Adella Wingfield, individually, and as guardian and conservator of her

major son, Kenny Clark, and Saratina Wingfield, Jason Eric Wingfield, and Joshua Elliot Wingfield;

Kipp Creed and Robert Kleinpeter, attorneys for Jackie Murray, Sharon Roy Royner, Ivy J. Wills as legal guardian and attorney for Joseph Edward Wingfield, and Joseph Edward Wingfield individually;

Stacey Moak and Douglas Chapoton, attorneys for State of Louisiana, Through Department of Transportation and Development ("DOTD"); and

David Bienvenu and Brynn Biamonte, attorneys for National Union Fire Insurance Company of Pittsburgh, PA. ("National Union").

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that, pursuant to the jury's special verdict signed on February 21, 2001 and applicable Louisiana law, the evidence presented at trial proved that DOTD had custody over the subject portion of I-10, that there was a defect in the subject portion of I-10 which caused an unreasonable risk of harm, that DOTD had notice of the defect and failed to repair it, that the defect caused the immediate accident of August 6, 1994 and plaintiffs' resulting injuries, that Kenny Clark was negligent with regard to the accident, that Kenny Clark's negligence was a cause in fact of the accident, and that DOTD was 54% at fault and Kenny Clark was 46% at fault.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that there be judgment against the State of Louisiana, through the Department of Transportation and Development, for the first $5,000,000 plus legal interest from the date of judicial demand (pursuant to

the terms of the applicable insurance policy between DOTD and National Union), and against DOTD and National Union jointly, severally, and in solido, for the amount of the judgment which exceeds $5,000,000 (to the limit of the applicable insurance policy) plus legal interest from the date of judicial demand.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that, pursuant to the jury's special verdict signed on February 21, 2001, this Court's oral reasons assigned following the April 23, 2001 hearing regarding this issue, and applicable Louisiana law, neither plaintiff, Jack Wingfield, nor any other entity, was comparatively negligent in causing the accident of August 6, 1994; therefore, as Kenny Clark and Jack Wingfield were co-employees within the course and scope of their employment at the time of the subject accident, defendants are liable unto Jack Wingfield's heirs for 100% of the survival action and wrongful death action damages as itemized by the special verdict form signed on February 21, 2001.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that, pursuant to the jury's verdict signed on February 21, 2001 and applicable Louisiana law, defendants, DOTD and National Union, pay 54% of Kenny Clark's recoverable damages, and 54% of Gordean "Deanie" Wingfield's derivative claim relating to Kenny Clark's injuries, as follows:

Kenny Clark	Total	54%
Past Medical Expenses	$ 1,610,382	$ 869,606
Future Medical Expenses	$ 4,000,000	$2,160,000

Past Lost Wages	$ 105,443	$ 56,939
Future Lost Wages/Earning Capacity	$ 400,459	$ 216,248
Past and Future Bodily Injury, Physical Pain and Suffering	$ 1,500,000	$ 810,000
Past and Future Mental Anguish and Distress	$ 1,500,000	$ 810,000
Past and Future Permanent Disability and Disfigurement	$ 500,000	$ 270,000
Past and Future Loss of Enjoyment of Life	$ 1,500,000	$ 810,000
TOTAL	$ 11,116,284	$6,002,793

plus legal interest from the date of judicial demand.

Gordean "Deanie Wingfield"

Loss of Consortium	$ 500,000	$ 270,000

plus legal interest from the date of judicial demand.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that, pursuant to the jury's verdict signed on February 21, 2001, this Court's oral reasons assigned following the April 23, 2001 hearing regarding this issue, and applicable Louisiana law, defendants pay 100% of plaintiffs' survival action and wrongful death action damages relating to the death of Jack Wingfield, as follows:

Survival Action	
Medical and Funeral Expenses	$ 14,271
Pain and Suffering	$ 800,000
Wrongful Death Actions	
Gordean "Deanie" Wingfield's Loss of Support	$ 70,000
Gordean "Deanie" Wingfield's Wrongful Death Claim	$1,000,000
Saratina Wingfield's Wrongful Death Claim	$ 75,000
Jason Wingfield's Wrongful Death Claim	$ 75,000
Joshua Wingfield's Wrongful Death Claim	$ 75,000
Jackie Murray's Wrongful Death Claim	$ 75,000
Sharon Royner's Wrongful Death Claim	$ 75,000
Joseph Wingfield's Wrongful Death Claim	$ 75,000

plus legal interest from the date of judicial demand.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that, pursuant to applicable Louisiana law, and this Court's Written Reasons signed May 8, 2001 regarding this issue, a reversionary trust shall be established pursuant to LSA-R.S. 13:506 for the benefit of Kenny Clark in the amount of $2,376,248 (the sum total of the amount of future medical expenses and future loss of income awarded to Kenny Clark by the jury and reduced by his 46%

comparative fault) plus accrued legal interest from the date of judicial demand on this amount through the date this reversionary trust is established, minus the percentage which is due Kenny Clark's attorneys in accordance with their contingency fee contract.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that, pursuant to applicable Louisiana law, defendants, DOTD and National Union, pay ~~54%~~ 66% of all taxable costs and legal interest from the date of judicial demand until payment is made; the specific amount of recoverable costs will be determined by this Court at a later date.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that, pursuant to LSA-C.C.P. art. 1918, this judgment is a final one.

THUS DONE AND SIGNED this 25th day of May, 2001, at Baton Rouge, Louisiana.

/s/ J. Michael McDonald
JUDGE MICHAEL M. MCDONALD

I HEREBY CERTIFY THAT ON THIS DAY A COPY OF THE WRITTEN REASONS FOR JUDGMENT/ DISMISSAL/ JUDGMENT / ORDER/ WAS MAILED BY ME, WITH SUFFICIENT POSTAGE AFFIXED TO:

/s/ Kleinpeter
/s/ Fornais
/s/ Moak
/s/ Moore
/s/ Bienvenu
/s/ Creed

DONE AND SIGNED ON 5-25-01

/s/ [Illegible]
DEPUTY CLERK OF COURT

GORDEAN ADELLA WINGFIELD, ET AL	* NUMBER 418,074 SECTION 15
VERSUS	* 19TH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, WILSON TRAILER COMPANY, INC.	* PARISH OF EAST BATON ROUGE
	* STATE OF LOUISIANA

CONSOLIDATED WITH

JACKIE MURRAY, SHARON ROY ROYNER, IVY J. WILLS AS LEGAL GUARDIAN AND ATTORNEY FOR JOSEPH EDWARD WINGFIELD, AND JOSEPH EDWARD WINGFIELD INDIVIDUALLY	* NUMBER 418,842 SECTION 12
	* 19TH JUDICIAL DISTRICT COURT
VERSUS	
STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, WILSON TRAILER COMPANY, INC.	* PARISH OF EAST BATON ROUGE
	* STATE OF LOUISIANA

JUDGMENT REGARDING POST-TRIAL MOTIONS AND AMENDED FINAL JUDGMENT

On July 23, 2001, oral argument was heard in open court regarding the following post-trial motions:

1. Plaintiffs' Motion for New Trial, and in the Alternative, Motion to Declare Repealed LSA-R.S. 13:5114 Unconstitutional;

2. Plaintiffs' Joint Rule to Tax Costs; and

3. Defendants' Motion for Judgment Notwithstanding the Verdict, and/or New Trial.

Present were:

Charles R. Moore and J. E. Cullens, Jr., attorneys for Gordean Adella Wingfield, individually, and as guardian and conservator of her major son, Kenny Clark, and Saratina Wingfield, Jason Eric Wingfield, and Joshua Elliot Wingfield;

Kipp Creed, attorney for Jackie Murray, Sharon Roy Royner, Ivy J. Wills as legal guardian and attorney for Joseph Edward Wingfield, and Joseph Edward Wingfield individually;

Stacey Moak and Douglas Chapoton, attorneys for State of Louisiana, Through Department of Transportation and Development ("DOTD"); and

David Bienvenu, attorney for National Union Fire Insurance Company of Pittsburgh, PA. ("National Union").

After considering the written motions, attachments to all written motions, all exhibits presented to the court, and oral argument of counsel, the Court ruled as follows:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Motion for New Trial, and in the Alternative, Motion to Declare Repealed LSA-R.S. 13:5114 Unconstitutional, filed herein by plaintiffs, is **GRANTED IN PART AND DENIED IN PART**; plaintiffs' motion is **GRANTED** to exclude any award for future economic losses (i.e., the jury's "Future Lost Wages/Earning Capacity" award) to Kenny Clark from

any reversionary trust created in this matter; plaintiffs' motion is **DENIED** in all other respects; the Final Judgment signed herein on May 25, 2001 is hereby amended to conform with this ruling; i.e., that, pursuant to applicable Louisiana law, this Court's Written Reasons signed May 8, 2001 regarding this issue, and this Court's oral reasons assigned following the July 23, 2001 hearing, a reversionary trust shall be established pursuant to LSA-R.S. 13:5106 for the benefit of Kenny Clark in the amount of $2,160,000 (the amount of future medical expenses awarded to Kenny Clark by the jury and reduced by his 46% comparative fault) plus accrued legal interest from the date of judicial demand on this amount through the date this reversionary trust is established, minus the percentage which is due Kenny Clark's attorneys in accordance with their contingency fee contract.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Joint Rule to Tax Costs, filed herein by plaintiffs, has been taken under advisement.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Motion for Judgment Notwithstanding the Verdict, and/or New Trial, filed herein by defendants, is **GRANTED IN PART AND DENIED IN PART**; defendants' motion is **GRANTED** to reduce the jury's survival action award to plaintiffs for the "Pain and Suffering" of Jack Wingfield from $800,000 to $500,000; plaintiffs' motion is **DENIED** in all other respects; the Final Judgment signed herein on May 25, 2001 is hereby amended to conform with this ruling.

JUDGMENT RENDERED in open court on July 23, 2001.

THUS DONE AND SIGNED this 3 day of ~~July~~ August, 2001, at Baton Rouge, Louisiana.

/s/ J. Michael McDonald
JUDGE MICHAEL M. MCDONALD

I HEREBY CERTIFY THAT ON THIS DAY A COPY OF THE WRITTEN REASONS FOR JUDGMENT/ DISMISSAL/ JUDGMENT / ORDER/ WAS MAILED BY ME, WITH SUFFICIENT POSTAGE AFFIXED TO:

/s/ Kleinpeter
/s/ Fornais
/s/ Moak
/s/ Moore
/s/ Bienvenu
/s/ Creed

DONE AND SIGNED ON 8-3-01

/s/ [Illegible]
DEPUTY CLERK OF COURT

COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA

RE: Docket Number 2001-CA-2668

GORDEAN ADELLA WINGFIELD, INDIVIDUALLY AND AS GUARDIAN AND CONSERVATOR OF THE ESTATE OF HER MAJOR SON, KENNY CLARK

19th Judicial District Court
Case #: 418074
East Baton Rouge Parish

- - Versus - -

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, WILSON TRAILER COMPANY, INC. AND NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

On Application for Rehearing.

Rehearing DENIED

/s/ Brady M. Fitzsimmons
Brady M. Fitzsimmons

/s/ E. James Gaidry
E. James Gaidry

/s/ A. Clayton James
A. Clayton James

Filed Dec 31 2002

/s/ Christine L. Crow
Christine L. Crow, Clerk

845 So.2d 1060

Supreme Court of Louisiana.

Gordean Adella WINGFIELD, Individually and as Guardian and Conservator of the Estate of Her Major Son Kenny Clark

v.

STATE of Louisiana Through the DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, Wilson Trailer Company, Inc. and National Union Fire Insurance Company of Pittsburgh, PA.

Jackie Murray, Sharon Ray Rovner, Ivy J. Wills as Legal Guardian and Attorney for Joseph Edward Wingfield and Joseph Edward Wingfield

v.

State of Louisiana, Through the Department of Transportation and Development and Wilson Trailer Company, Inc.

No. 2003-C-0339.

May 30, 2003.

Prior report: La.App., 835 So.2d 785.

In re Louisiana State of et al.; – Defendant; Applying for Writ of Certiorari and/or Review, Parish of E. Baton Rouge, 19th Judicial District Court Div. H. Nos. 418,842, 418,074; to the Court of Appeal, First Circuit, No(s). 2001 CA 2668, 2001 CA 2669.

Denied.

VICTORY, J., would grant the writ.

KNOLL, J., would grant the writ.

WEIMER, J., would grant the writ

U.S.C.A. Const. Art. VI cl. 2
Current through P.L. 108-71, approved 08-14-03

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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23 U.S.C.A. § 101
Current through P.L. 108-71, approved 08-14-03

(a) Definitions. – In this title, the following definitions apply:

(1) Apportionment. – The term "apportionment" includes unexpended apportionments made under prior authorization laws.

(2) Carpool project. – The term "carpool project" means any project to encourage the use of carpools and vanpools, including provision of carpooling opportunities to the elderly and individuals with disabilities, systems for locating potential riders and informing them of carpool opportunities, acquiring vehicles for carpool use, designating existing highway lanes as preferential carpool highway lanes, providing related traffic control devices, and designating existing facilities for use for preferential parking for carpools.

(3) Construction. – The term "construction" means the supervising, inspecting, actual building, and incurrence of all costs incidental to the construction or reconstruction of

a highway, including bond costs and other costs relating to the issuance in accordance with section 122 of bonds or other debt financing instruments and costs incurred by the State in performing Federal-aid project related audits that directly benefit the Federal-aid highway program. Such term includes –

(A) locating, surveying, and mapping (including the establishment of temporary and permanent geodetic markers in accordance with specifications of the National Oceanic and Atmospheric Administration of the Department of Commerce);

(B) resurfacing, restoration, and rehabilitation;

(C) acquisition of rights-of-way;

(D) relocation assistance, acquisition of replacement housing sites, and acquisition and rehabilitation, relocation, and construction of replacement housing;

(E) elimination of hazards of railway grade crossings;

(F) elimination of roadside obstacles;

(G) improvements that directly facilitate and control traffic flow, such as grade separation of intersections, widening of lanes, channelization of traffic, traffic control systems, and passenger loading and unloading areas; and

(H) capital improvements that directly facilitate an effective vehicle weight enforcement program, such as scales (fixed and portable), scale pits, scale installation, and scale houses.

(4) County. – The term "county" includes corresponding units of government under any other name in States that do not have county organizations and, in those States in

which the county government does not have jurisdiction over highways, any local government unit vested with jurisdiction over local highways.

(5) Federal-aid highway. – The term "Federal-aid highway" means a highway eligible for assistance under this chapter other than a highway classified as a local road or rural minor collector.

(6) Federal-aid system. – The term "Federal-aid system" means any of the Federal-aid highway systems described in section 103.

(7) Federal lands highway. – The term "Federal lands highway" means a forest highway, public lands highway, park road, parkway, refuge road, and Indian reservation road that is a public road.

(8) Forest development roads and trails. – The term "forest development roads and trails" means forest roads and trails under the jurisdiction of the Forest Service.

(9) Forest highway. – The term "forest highway" means a forest road under the jurisdiction of, and maintained by, a public authority and open to public travel.

(10) Forest road or trail. – The term "forest road or trail" means a road or trail wholly or partly within, or adjacent to, and serving the National Forest System that is necessary for the protection, administration, and utilization of the National Forest System and the use and development of its resources.

(11) Highway. – The term "highway" includes –

(A) a road, street, and parkway;

(B) a right-of-way, bridge, railroad-highway crossing, tunnel, drainage structure, sign, guardrail, and protective structure, in connection with a highway; and

(C) a portion of any interstate or international bridge or tunnel and the approaches thereto, the cost of which is assumed by a State transportation department, including such facilities as may be required by the United States Customs and Immigration Services in connection with the operation of an international bridge or tunnel.

(12) Indian reservation road. – The term "Indian reservation road" means a public road that is located within or provides access to an Indian reservation or Indian trust land or restricted Indian land that is not subject to fee title alienation without the approval of the Federal Government, or Indian and Alaska Native villages, groups, or communities in which Indians and Alaskan Natives reside, whom the Secretary of the Interior has determined are eligible for services generally available to Indians under Federal laws specifically applicable to Indians.

(13) Interstate System. – The term "Interstate System" means the Dwight D. Eisenhower National System of Interstate and Defense Highways described in section 103(c).

(14) Maintenance. – The term "maintenance" means the preservation of the entire highway, including surface, shoulders, roadsides, structures, and such traffic-control devices as are necessary for safe and efficient utilization of the highway.

(15) Maintenance area. – The term "maintenance area" means an area that was designated as a nonattainment area, but was later redesignated by the Administrator of

the Environmental Protection Agency as an attainment area, under section 107(d) of the Clean Air Act (42 U.S.C. 7407(d)).

(16) National Highway System. – The term "National Highway System" means the Federal-aid highway system described in section 103(b).

(17) Operating costs for traffic monitoring, management, and control. – The term "operating costs for traffic monitoring, management, and control" includes labor costs, administrative costs, costs of utilities and rent, and other costs associated with the continuous operation of traffic control, such as integrated traffic control systems, incident management programs, and traffic control centers.

(18) Operational improvement. – The term "operational improvement" –

(A) means (i) a capital improvement for installation of traffic surveillance and control equipment, computerized signal systems, motorist information systems, integrated traffic control systems, incident management programs, and transportation demand management facilities, strategies, and programs, and (ii) such other capital improvements to public roads as the Secretary may designate, by regulation; and

(B) does not include resurfacing, restoring, or rehabilitating improvements, construction of additional lanes, interchanges, and grade separations, and construction of a new facility on a new location.

(19) Park road. – The term "park road" means a public road, including a bridge built primarily for pedestrian use, but with capacity for use by emergency vehicles, that is located within, or provides access to, an area in the National

Park System with title and maintenance responsibilities vested in the United States.

(20) Parkway. – The term "parkway", as used in chapter 2 of this title, means a parkway authorized by Act of Congress on lands to which title is vested in the United States.

(21) Project. – The term "project" means an undertaking to construct a particular portion of a highway, or if the context so implies, the particular portion of a highway so constructed or any other undertaking eligible for assistance under this title.

(22) Project agreement. – The term "project agreement" means the formal instrument to be executed by the State transportation department and the Secretary as required by section 106.

(23) Public authority. – The term "public authority" means a Federal, State, county, town, or township, Indian tribe, municipal or other local government or instrumentality with authority to finance, build, operate, or maintain toll or toll-free facilities.

(24) Public lands development roads and trails. – The term "public lands development roads and trails" means those roads and trails that the Secretary of the Interior determines are of primary importance for the development, protection, administration, and utilization of public lands and resources under the control of the Secretary of the Interior.

(25) Public lands highway. – The term "public lands highway" means a forest road under the jurisdiction of and maintained by a public authority and open to public travel or any highway through unappropriated or unreserved

public lands, nontaxable Indian lands, or other Federal reservations under the jurisdiction of and maintained by a public authority and open to public travel.

(26) Public lands highways. – The term "public lands highways" means those main highways through unappropriated or unreserved public lands, nontaxable Indian lands, or other Federal reservations, which are on the Federal-aid systems.

(27) Public road. – The term "public road" means any road or street under the jurisdiction of and maintained by a public authority and open to public travel.

(28) Refuge road. – The term "refuge road" means a public road that provides access to or within a unit of the National Wildlife Refuge System and for which title and maintenance responsibility is vested in the United States Government.

(29) Rural areas. – The term "rural areas" means all areas of a State not included in urban areas.

(30) Safety improvement project. – The term "safety improvement project" means a project that corrects or improves high hazard locations, eliminates roadside obstacles, improves highway signing and pavement marking, installs priority control systems for emergency vehicles at signalized intersections, installs or replaces emergency motorist aid call boxes, or installs traffic control or warning devices at locations with high accident potential.

(31) Secretary. – The term "Secretary" means Secretary of Transportation.

(32) State. – The term "State" means any of the 50 States, the District of Columbia, or Puerto Rico.

(33) State funds. – The term "State funds" includes funds raised under the authority of the State or any political or other subdivision thereof, and made available for expenditure under the direct control of the State transportation department.

(34) State transportation department. – The term "State transportation department" means that department, commission, board, or official of any State charged by its laws with the responsibility for highway construction.

(35) Transportation enhancement activities. – The term "transportation enhancement activities" means, with respect to any project or the area to be served by the project, any of the following activities if such activity relates to surface transportation: provision of facilities for pedestrians and bicycles, provision of safety and educational activities for pedestrians and bicyclists, acquisition of scenic easements and scenic or historic sites, scenic or historic highway programs (including the provision of tourist and welcome center facilities), landscaping and other scenic beautification, historic preservation, rehabilitation and operation of historic transportation buildings, structures, or facilities (including historic railroad facilities and canals), preservation of abandoned railway corridors (including the conversion and use thereof for pedestrian or bicycle trails), control and removal of outdoor advertising, archaeological planning and research, environmental mitigation to address water pollution due to highway runoff or reduce vehicle-caused wildlife mortality while maintaining habitat connectivity, and establishment of transportation museums.

(36) Urban area. – The term "urban area" means an urbanized area or, in the case of an urbanized area encompassing more than one State, that part of the urbanized area in each such State, or urban place as designated by the Bureau of the Census having a population of 5,000 or more and not within any urbanized area, within boundaries to be fixed by responsible State and local officials in cooperation with each other, subject to approval by the Secretary. Such boundaries shall encompass, at a minimum, the entire urban place designated by the Bureau of the Census, except in the case of cities in the State of Maine and in the State of New Hampshire.

(37) Urbanized area. – The term "urbanized area" means an area with a population of 50,000 or more designated by the Bureau of the Census, within boundaries to be fixed by responsible State and local officials in cooperation with each other, subject to approval by the Secretary. Such boundaries shall encompass, at a minimum, the entire urbanized area within a State as designated by the Bureau of the Census.

(b) It is hereby declared to be in the national interest to accelerate the construction of the Federal-aid highway systems, including The Dwight D. Eisenhower System of Interstate and Defense Highways, since many of such highways, or portions thereof, are in fact inadequate to meet the needs of local and interstate commerce, for the national and civil defense.

It is hereby declared that the prompt and early completion of The Dwight D. Eisenhower System of Interstate and Defense Highways, so named because of its primary importance to the national defense and hereafter referred to as the "Interstate System", is essential to the national

interest and is one of the most important objectives of this Act. It is the intent of Congress that the Interstate System be completed as nearly as practicable over the period of availability of the forty years' appropriations authorized for the purpose of expediting its construction, reconstruction, or improvement, inclusive of necessary tunnels and bridges, through the fiscal year ending September 30, 1996, under section 108(b) of the Federal-Aid Highway Act of 1956 (70 Stat. 374), and that the entire System in all States be brought to simultaneous completion. Insofar as possible in consonance with this objective, existing highways located on an interstate route shall be used to the extent that such use is practicable, suitable, and feasible, it being the intent that local needs, to the extent practicable, suitable, and feasible, shall be given equal consideration with the needs of interstate commerce.

It is further declared that since the Interstate System is now in the final phase of completion it shall be the national policy that increased emphasis be placed on the construction and reconstruction of the other Federal-aid systems in accordance with the first paragraph of this subsection, in order to bring all of the Federal-aid systems up to standards and to increase the safety of these systems to the maximum extent.

(c) It is the sense of Congress that under existing law no part of any sums authorized to be appropriated for expenditure upon any Federal-aid system which has been apportioned pursuant to the provisions of this title shall be impounded or withheld from obligation, for purposes and projects as provided in this title, by any officer or employee in the executive branch of the Federal Government, except such specific sums as may be determined by the Secretary of the Treasury, after consultation with the Secretary of

Transportation, are necessary to be withheld from obligation for specific periods of time to assure that sufficient amounts will be available in the Highway Trust Fund to defray the expenditures which will be required to be made from such fund.

(d) No funds authorized to be appropriated from the Highway Trust Fund shall be expended by or on behalf of any Federal department, agency, or instrumentality other than the Federal Highway Administration unless funds for such expenditure are identified and included as a line item in an appropriation Act and are to meet obligations of the United States heretofore or hereafter incurred under this title attributable to the construction of Federal-aid highways or highway planning, research, or development, or as otherwise specifically authorized to be appropriated from the Highway Trust Fund by Federal-aid highway legislation.

(e) It is the national policy that to the maximum extent possible the procedures to be utilized by the Secretary and all other affected heads of Federal departments, agencies, and instrumentalities for carrying out this title and any other provision of law relating to the Federal highway programs shall encourage the substantial minimization of paperwork and interagency decision procedures and the best use of available manpower and funds so as to prevent needless duplication and unnecessary delays at all levels of government.

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23 U.S.C.A. § 103

(a) In general. – For the purposes of this title, the Federal-aid systems are the Interstate System and the National Highway System.

(b) National Highway System. –

(1) Description. – The National Highway System consists of the highway routes and connections to transportation facilities depicted on the map submitted by the Secretary to Congress with the report entitled "Pulling Together: The National Highway System and its Connections to Major Intermodal Terminals" and dated May 24, 1996. The system shall –

(A) serve major population centers, international border crossings, ports, airports, public transportation facilities, and other intermodal transportation facilities and other major travel destinations;

(B) meet national defense requirements; and

(C) serve interstate and interregional travel.

(2) Components. – The National Highway System described in paragraph (1) consists of the following:

(A) The Interstate System described in subsection (c).

(B) Other urban and rural principal arterial routes.

(C) Other connector highways (including toll facilities) that provide motor vehicle access between arterial routes on the National Highway System and a major intermodal transportation facility.

(D) A strategic highway network consisting of a network of highways that are important to the United States

strategic defense policy and that provide defense access, continuity, and emergency capabilities for the movement of personnel, materials, and equipment in both peacetime and wartime. The highways may be highways on or off the Interstate System and shall be designated by the Secretary in consultation with appropriate Federal agencies and the States.

(E) Major strategic highway network connectors consisting of highways that provide motor vehicle access between major military installations and highways that are part of the strategic highway network. The highways shall be designated by the Secretary in consultation with appropriate Federal agencies and the States.

(3) Maximum mileage. – The mileage of highways on the National Highway System shall not exceed 178,250 miles.

(4) Modifications to NHS. –

(A) In general. – The Secretary may make any modification, including any modification consisting of a connector to a major intermodal terminal, to the National Highway System that is proposed by a State or that is proposed by a State and revised by the Secretary if the Secretary determines that the modification –

(i) meets the criteria established for the National Highway System under this title; and

(ii) enhances the national transportation characteristics of the National Highway System.

(B) Cooperation. –

(i) In general. – In proposing a modification under this paragraph, a State shall cooperate with local and regional officials.

(ii) Urbanized areas. – In an urbanized area, the local officials shall act through the metropolitan planning organization designated for the area under section 134.

(5) Congressional high priority corridors. – Upon the completion of feasibility studies, the Secretary shall add to the National Highway System any congressional high priority corridor or any segment of such a corridor established by section 1105 of the Intermodal Surface Transportation Efficiency Act of 1991 (105 Stat. 2031 et seq.) that was not identified on the National Highway System described in paragraph (1).

(6) Eligible projects for NHS. – Subject to approval by the Secretary, funds apportioned to a State under section 104(b)(1) for the National Highway System may be obligated for any of the following:

(A) Construction, reconstruction, resurfacing, restoration, and rehabilitation of segments of the National Highway System.

(B) Operational improvements for segments of the National Highway System.

(C) Construction of, and operational improvements for, a Federal-aid highway not on the National Highway System, and construction of a transit project eligible for assistance under chapter 53 of title 49, if –

(i) the highway or transit project is in the same corridor as, and in proximity to, a fully access-controlled highway designated as a part of the National Highway System;

(ii) the construction or improvements will improve the level of service on the fully access-controlled highway described in clause (i) and improve regional traffic flow; and

(iii) the construction or improvements are more cost-effective than an improvement to the fully access-controlled highway described in clause (i).

(D) Highway safety improvements for segments of the National Highway System.

(E) Transportation planning in accordance with sections 134 and 135.

(F) Highway research and planning in accordance with chapter 5.

(G) Highway-related technology transfer activities.

(H) Capital and operating costs for traffic monitoring, management, and control facilities and programs.

(I) Fringe and corridor parking facilities.

(J) Carpool and vanpool projects.

(K) Bicycle transportation and pedestrian walkways in accordance with section 217.

(L) Development, establishment, and implementation of management systems under section 303.

(M) In accordance with all applicable Federal law (including regulations), participation in natural habitat and wetland mitigation efforts related to projects funded under this title, which may include participation in natural habitat and wetland mitigation banks, contributions to statewide and regional efforts to conserve, restore, enhance, and create natural habitats and wetland, and

development of statewide and regional natural habitat and wetland conservation and mitigation plans, including any such banks, efforts, and plans authorized under the Water Resources Development Act of 1990 (Public Law 101-640) (including crediting provisions). Contributions to the mitigation efforts described in the preceding sentence may take place concurrent with or in advance of project construction; except that contributions in advance of project construction may occur only if the efforts are consistent with all applicable requirements of Federal law (including regulations) and State transportation planning processes. With respect to participation in a natural habitat or wetland mitigation effort related to a project funded under this title that has an impact that occurs within the service area of a mitigation bank, preference shall be given, to the maximum extent practicable, to the use of the mitigation bank if the bank contains sufficient available credits to offset the impact and the bank is approved in accordance with the Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (60 Fed. Reg. 58605 (November 28, 1995)) or other applicable Federal law (including regulations).

(N) Publicly-owned intracity or intercity bus terminals.

(C) Infrastructure-based intelligent transportation systems capital improvements.

(P) In the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, any project eligible for assistance under section 133, any airport, and any seaport.

(c) Interstate System. –

(1) Description. –

(A) In general. – The Dwight D. Eisenhower National System of Interstate and Defense Highways within the United States (including the District of Columbia and Puerto Rico) consists of highways designed, located, and selected in accordance with this paragraph.

(B) Design. –

(i) In general. – Except as provided in clause (ii), highways on the Interstate System shall be designed in accordance with the standards of section 109(b).

(ii) Exception. – Highways on the Interstate System in Alaska and Puerto Rico shall be designed in accordance with such geometric and construction standards as are adequate for current and probable future traffic demands and the needs of the locality of the highway.

(C) Location. – Highways on the Interstate System shall be located so as –

(i) to connect by routes, as direct as practicable, the principal metropolitan areas, cities, and industrial centers;

(ii) to serve the national defense; and

(iii) to the maximum extent practicable, to connect at suitable border points with routes of continental importance in Canada and Mexico.

(D) Selection of routes. – To the maximum extent practicable, each route of the Interstate System shall be selected by joint action of the State transportation departments of the State in which the route is located and the adjoining States, in cooperation with local and regional officials, and subject to the approval of the Secretary.

(2) Maximum mileage. – The mileage of highways on the Interstate System shall not exceed 43,000 miles, exclusive of designations under paragraph (4).

(3) Modifications. – The Secretary may approve or require modifications to the Interstate System in a manner consistent with the policies and procedures established under this subsection.

(4) Interstate System designations. –

(A) Additions. – If the Secretary determines that a highway on the National Highway System meets all standards of a highway on the Interstate System and that the highway is a logical addition or connection to the Interstate System, the Secretary may, upon the affirmative recommendation of the State or States in which the highway is located, designate the highway as a route on the Interstate System.

(B) Designations as future Interstate System routes. –

(i) In general. – If the Secretary determines that a highway on the National Highway System would be a logical addition or connection to the Interstate System and would qualify for designation as a route on the Interstate System under subparagraph (A) if the highway met all standards of a highway on the Interstate System, the Secretary may, upon the affirmative recommendation of the State or States in which the highway is located, designate the highway as a future Interstate System route.

(ii) Written agreement of States. – A designation under clause (i) shall be made only upon the written agreement of the State or States described in such clause that the highway will be constructed to meet all standards of a

highway on the Interstate System by the date that is 12 years after the date of the agreement.

(iii) Removal of designation. –

(I) In general. – If the State or States described in clause (i) have not substantially completed the construction of a highway designated under this subparagraph within the time provided for in the agreement between the Secretary and the State or States under clause (ii), the Secretary shall remove the designation of the highway as a future Interstate System route.

(II) Effect of removal. – Removal of the designation of a highway under subclause (I) shall not preclude the Secretary from designating the highway as a route on the Interstate System under subparagraph (A) or under any other provision of law providing for addition to the Interstate System.

(iv) Prohibition on referral as Interstate System route. – No law, rule, regulation, map, document, or other record of the United States, or of any State or political subdivision of a State, shall refer to any highway designated as a future Interstate System route under this subparagraph, nor shall any such highway be signed or marked, as a highway on the Interstate System until such time as the highway is constructed to the geometric and construction standards for the Interstate System and has been designated as a route on the Interstate System.

(C) Financial responsibility. – Except as provided in this title, the designation of a highway under this paragraph shall create no additional Federal financial responsibility with respect to the highway.

(d) Transfer of Interstate Construction Funds. –

(1) Interstate Construction Funds not in surplus. –

(A) In general. – Upon application by a State and approval by the Secretary, the Secretary may transfer to the apportionment of the State under section 104(b)(1) any amount of funds apportioned to the State under section 104(b)(5)(A) (as in effect on the day before the date of enactment of the Transportation Equity Act for the 21st Century), if the amount does not exceed the Federal share of the costs of construction of segments of the Interstate System in the State included in the most recent Interstate System cost estimate.

(B) Effect of transfer. – Upon transfer of an amount under subparagraph (A), the construction on which the amount is based, as included in the most recent Interstate System cost estimate, shall not be eligible for funding under section 104(b)(5)(A) (as in effect on the day before the date of enactment of the Transportation Equity Act for the 21st Century) or 118(c).

(2) Surplus Interstate Construction Funds. – Upon application by a State and approval by the Secretary, the Secretary may transfer to the apportionment of the State under section 104(b)(1) any amount of surplus funds apportioned to the State under section 104(b)(5)(A) (as in effect on the day before the date of enactment of the Transportation Equity Act for the 21st Century), if the State has fully financed all work eligible under the most recent Interstate System cost estimate.

(3) Applicability of certain laws. – Funds transferred under this subsection shall be subject to the laws (including regulations, policies, and procedures) relating to the apportionment to which the funds are transferred.

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23 U.S.C.A. § 106

Current through P.L. 108-71, approved 08-14-03

(a) In general. –

(1) Submission of plans, specifications, and estimates. – Except as otherwise provided in this section, each State transportation department shall submit to the Secretary for approval such plans, specifications, and estimates for each proposed project as the Secretary may require.

(2) Project agreement. – The Secretary shall act on the plans, specifications, and estimates as soon as practicable after the date of their submission and shall enter into a formal project agreement with the State transportation department formalizing the conditions of the project approval.

(3) Contractual obligation. – The execution of the project agreement shall be deemed a contractual obligation of the Federal Government for the payment of the Federal share of the cost of the project.

(4) Guidance. – In taking action under this subsection, the Secretary shall be guided by section 109.

(b) Project agreement. –

(1) Provision of State funds. – The project agreement shall make provision for State funds required to pay the State's non-Federal share of the cost of construction of the project and to pay for maintenance of the project after completion of construction.

(2) Representations of State. – If a part of the project is to be constructed at the expense of, or in cooperation with, political subdivisions of the State, the Secretary may rely

on representations made by the State transportation department with respect to the arrangements or agreements made by the State transportation department and appropriate local officials for ensuring that the non-Federal contribution will be provided under paragraph (1).

(c) Assumption by States of responsibilities of the Secretary. –

(1) Non-Interstate NHS projects. – For projects under this title that are on the National Highway System but not on the Interstate System, the State may assume the responsibilities of the Secretary under this title for design, plans, specifications, estimates, contract awards, and inspections of projects unless the State or the Secretary determines that such assumption is not appropriate.

(2) Non-NHS projects. – For projects under this title that are not on the National Highway System, the State shall assume the responsibilities of the Secretary under this title for design, plans, specifications, estimates, contract awards, and inspection of projects, unless the State determines that such assumption is not appropriate.

(3) Agreement. – The Secretary and the State shall enter into an agreement relating to the extent to which the State assumes the responsibilities of the Secretary under this subsection.

(4) Limitation on authority of Secretary. – The Secretary may not assume any greater responsibility than the Secretary is permitted under this title on September 30, 1997, except upon agreement by the Secretary and the State.

(d) Responsibilities of the Secretary. – Nothing in this section, section 133, or section 149 shall affect or discharge any responsibility or obligation of the Secretary under –

(1) section 113 or 114; or

(2) any Federal law other than this title (including section 5333 of title 49).

(e) Value engineering analysis. – For such projects as the Secretary determines advisable, plans, specifications, and estimates for proposed projects on any Federal-aid highway shall be accompanied by a value engineering analysis or other cost reduction analysis.

(f) Life-cycle cost analysis. –

(1) Use of life-cycle cost analysis. – The Secretary shall develop recommendations for the States to conduct life-cycle cost analyses. The recommendations shall be based on the principles contained in section 2 of Executive Order No. 12893 and shall be developed in consultation with the American Association of State Highway and Transportation Officials. The Secretary shall not require a State to conduct a life-cycle cost analysis for any project as a result of the recommendations required under this subsection.

(2) Life-cycle cost analysis defined. – In this subsection, the term "life-cycle cost analysis" means a process for evaluating the total economic worth of a usable project segment by analyzing initial costs and discounted future costs, such as maintenance, user costs, reconstruction, rehabilitation, restoring, and resurfacing costs, over the life of the project segment.

(g) Value engineering for NHS. –

(1) Requirement. – The Secretary shall establish a program to require States to carry out a value engineering analysis for all projects on the National Highway System with an estimated total cost of $25,000,000 or more.

(2) Value engineering defined. – In this subsection, the term "value engineering analysis" means a systematic process of review and analysis of a project during its design phase by a multidisciplined team of persons not involved in the project in order to provide suggestions for reducing the total cost of the project and providing a project of equal or better quality. Such suggestions may include combining or eliminating otherwise inefficient or expensive parts of the original proposed design for the project and total redesign of the proposed project using different technologies, materials, or methods so as to accomplish the original purpose of the project.

(h) Financial plan. – A recipient of Federal financial assistance for a project under this title with an estimated total cost of $1,000,000,000 or more shall submit to the Secretary an annual financial plan for the project. The plan shall be based on detailed annual estimates of the cost to complete the remaining elements of the project and on reasonable assumptions, as determined by the Secretary, of future increases in the cost to complete the project.

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23 U.S.C.A. § 109

Current through P.L. 108-71, approved 08-14-03

(a) In general. – The Secretary shall ensure that the plans and specifications for each proposed highway project under this chapter provide for a facility that will –

(1) adequately serve the existing and planned future traffic of the highway in a manner that is conducive to safety, durability, and economy of maintenance; and

(2) be designed and constructed in accordance with criteria best suited to accomplish the objectives described in paragraph (1) and to conform to the particular needs of each locality.

(b) The geometric and construction standards to be adopted for the Interstate System shall be those approved by the Secretary in cooperation with the State transportation departments. Such standards, as applied to each actual construction project, shall be adequate to enable such project to accommodate the types and volumes of traffic anticipated for such project for the twenty-year period commencing on the date of approval by the Secretary, under section 106 of this title, of the plans, specifications, and estimates for actual construction of such project. Such standards shall in all cases provide for at least four lanes of traffic. The right-of-way width of the Interstate System shall be adequate to permit construction of projects on the Interstate System to such standards. The Secretary shall apply such standards uniformly throughout all the States.

(c) Design criteria for National Highway System. –

(1) In general. – A design for new construction, reconstruction, resurfacing (except for maintenance resurfacing), restoration, or rehabilitation of a highway on the National Highway System (other than a highway also on the Interstate System) may take into account, in addition to the criteria described in subsection (a) –

(A) the constructed and natural environment of the area;

(B) the environmental, scenic, aesthetic, historic, community, and preservation impacts of the activity; and

(C) access for other modes of transportation.

(2) Development of criteria. – The Secretary, in cooperation with State transportation departments, may develop criteria to implement paragraph (1). In developing criteria under this paragraph, the Secretary shall consider the results of the committee process of the American Association of State Highway and Transportation Officials as used in adopting and publishing "A Policy on Geometric Design of Highways and Streets", including comments submitted by interested parties as part of such process.

(d) On any highway project in which Federal funds hereafter participate, or on any such project constructed since December 20, 1944, the location, form and character of informational, regulatory and warning signs, curb and pavement or other markings, and traffic signals installed or placed by any public authority or other agency, shall be subject to the approval of the State transportation department with the concurrence of the Secretary, who is directed to concur only in such installations as will promote the safe and efficient utilization of the highways.

(e) No funds shall be approved for expenditure on any Federal-aid highway, or highway affected under chapter 2 of this title, unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad grade crossing or drawbridge on that portion of the highway with respect to which such expenditures are to be made.

(f) The Secretary shall not, as a condition precedent to his approval under section 106 of this title, require any State to acquire title to, or control of, any marginal land along the proposed highway in addition to that reasonably necessary for road surfaces, median strips, bikeways, gutters, ditches, and side slopes, and of sufficient width to provide service roads for adjacent property to permit safe access at controlled locations in order to expedite traffic, promote safety, and minimize roadside parking.

(g) The Secretary shall issue within 30 days after the day of enactment of the Federal-Aid Highway Act of 1970 guidelines for minimizing possible soil erosion from highway construction. Such guidelines shall apply to all proposed projects with respect to which plans, specifications, and estimates are approved by the Secretary after the issuance of such guidelines.

(h) Not later than July 1, 1972, the Secretary, after consultation with appropriate Federal and State officials, shall submit to Congress, and not later than 90 days after such submission, promulgate guidelines designed to assure that possible adverse economic, social, and environmental effects relating to any proposed project on any Federal-aid system have been fully considered in developing such project, and that the final decisions on the project are made in the best overall public interest, taking into consideration the need for fast, safe and efficient transportation, public services, and the costs of eliminating or minimizing such adverse effects and the following:

(1) air, noise, and water pollution;

(2) destruction or disruption of man-made and natural resources, aesthetic values, community cohesion and the availability of public facilities and services;

(3) adverse employment effects, and tax and property value losses;

(4) injurious displacement of people, businesses and farms; and

(5) disruption of desirable community and regional growth.

Such guidelines shall apply to all proposed projects with respect to which plans, specifications, and estimates are approved by the Secretary after the issuance of such guidelines.

(i) The Secretary, after consultation with appropriate Federal, State, and local officials, shall develop and promulgate standards for highway noise levels compatible with different land uses and after July 1, 1972, shall not approve plans and specifications for any proposed project on any Federal-aid system for which location approval has not yet been secured unless he determines that such plans and specifications include adequate measures to implement the appropriate noise level standards. The Secretary, after consultation with the Administrator of the Environmental Protection Agency and appropriate Federal, State, and local officials, may promulgate standards for the control of highway noise levels for highways on any Federal-aid system for which project approval has been secured prior to July 1, 1972. The Secretary may approve any project on a Federal-aid system to which noise-level standards are made applicable under the preceding sentence for the purpose of carrying out such standards. Such project may include, but is not limited to, the acquisition of additional rights-of-way, the construction of physical barriers, and landscaping. Sums apportioned for the Federal-aid system on which such project will be

located shall be available to finance the Federal share of such project. Such project shall be deemed a highway project for all purposes of this title.

(j) The Secretary, after consultation with the Administrator of the Environmental Protection Agency, shall develop and promulgate guidelines to assure that highways constructed pursuant to this title are consistent with any approved plan for –

(1) the implementation of a national ambient air quality standard for each pollutant for which an area is designated as a nonattainment area under section 107(d) of the Clean Air Act (42 U.S.C. 7407(d)); or

(2) the maintenance of a national ambient air quality standard in an area that was designated as a nonattainment area but that was later redesignated by the Administrator as an attainment area for the standard and that is required to develop a maintenance plan under section 175A of the Clean Air Act (42 U.S.C. 7505a).

(k) The Secretary shall not approve any project involving approaches to a bridge under this title, if such project and bridge will significantly affect the traffic volume and the highway system of a contiguous State without first taking into full consideration the views of that State.

(l)(1) In determining whether any right-of-way on any Federal-aid highway should be used for accommodating any utility facility, the Secretary shall –

(A) first ascertain the effect such use will have on highway and traffic safety, since in no case shall any use be authorized or otherwise permitted, under this or any other provision of law, which would adversely affect safety;

(B) evaluate the direct and indirect environmental and economic effects of any loss of productive agricultural land or any impairment of the productivity of any agricultural land which would result from the disapproval of the use of such right-of-way for the accommodation of such utility facility; and

(C) consider such environmental and economic effects together with any interference with or impairment of the use of the highway in such right-of-way which would result from the use of such right-of-way for the accommodation of such utility facility.

(2) For the purpose of this subsection –

(A) the term "utility facility" means any privately, publicly, or cooperatively owned line, facility, or system for producing, transmitting, or distributing communications, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water not connected with highway drainage, or any other similar commodity, including any fire or police signal system or street lighting system, which directly or indirectly serves the public; and

(B) the term "right-of-way" means any real property, or interest therein, acquired, dedicated, or reserved for the construction, operation, and maintenance of a highway.

(m) Protection of nonmotorized transportation traffic. – The Secretary shall not approve any project or take any regulatory action under this title that will result in the severance of an existing major route or have significant adverse impact on the safety for nonmotorized transportation traffic and light motorcycles, unless such project or regulatory action provides for a reasonable alternate route or such a route exists.

(n) It is the intent of Congress that any project for resurfacing, restoring, or rehabilitating any highway, other than a highway access to which is fully controlled, in which Federal funds participate shall be constructed in accordance with standards to preserve and extend the service life of highways and enhance highway safety.

(o) Compliance with State laws for non-NHS projects. – Projects (other than highway projects on the National Highway System) shall be designed, constructed, operated, and maintained in accordance with State laws, regulations, directives, safety standards, design standards, and construction standards.

(p) Scenic and historic values. – Notwithstanding subsections (b) and (c), the Secretary may approve a project for the National Highway System if the project is designed to –

(1) allow for the preservation of environmental, scenic, or historic values;

(2) ensure safe use of the facility; and

(3) comply with subsection (a).

(q) Phase construction. – Safety considerations for a project under this title may be met by phase construction consistent with the operative safety management system established in accordance with section 303 or in accordance with a statewide transportation improvement program approved by the Secretary.

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23 U.S.C.A. § 114

Current through P.L. 108-71, approved 08-14-03

(a) Construction work in general. – The construction of any highways or portions of highways located on a Federal-aid system shall be undertaken by the respective State transportation departments or under their direct supervision. Except as provided in section 117 of this title, such construction shall be subject to the inspection and approval of the Secretary. The construction work and labor in each State shall be performed under the direct supervision of the State transportation department and in accordance with the laws of that State and applicable Federal laws. Construction may be begun as soon as funds are available for expenditure pursuant to subsection (a) of section 118 of this title. After July 1, 1973, the State transportation department shall not erect on any project where actual construction is in progress and visible to highway users any informational signs other than official traffic control devices conforming with standards developed by the Secretary of Transportation.

(b) Convict labor and convict produced materials. –

(1) Limitation on convict labor. – Convict labor shall not be used in construction of highways or portions of highways located on a Federal-aid system unless it is labor performed by convicts who are on parole, supervised release, or probation.

(2) Limitation on convict produced materials. – Materials produced after July 1, 1991, by convict labor may only be used in such construction –

(A) if such materials are produced by convicts who are on parole, supervised release, or probation from a prison; or

(B) if such materials are produced by convicts in a qualified prison facility and the amount of such materials produced in such facility for use in such construction during any 12-month period does not exceed the amount of such materials produced in such facility for use in such construction during the 12-month period ending July 1, 1987.

(3) Qualified prison facility defined. – As used in this subsection, "qualified prison facility" means any prison facility in which convicts, during the 12-month period ending July 1, 1987, produced materials for use in construction of highways or portions of highways located on a Federal-aid system.

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23 U.S.C.A. § 116

Current through P.L. 108-71, approved 08-14-03

(a) It shall be the duty of the State transportation department to maintain, or cause to be maintained, any project constructed under the provisions of this chapter or constructed under the provisions of prior Acts. The State's obligation to the United States to maintain any such project shall cease when it no longer constitutes a part of a Federal-aid system.

(b) In any State wherein the State transportation department is without legal authority to maintain a project constructed on the Federal-aid secondary system, or within a municipality, such highway department shall enter into a formal agreement for its maintenance with the appropriate officials of the county or municipality in which such project is located.

(c) If at any time the Secretary shall find that any project constructed under the provisions of this chapter, or constructed under the provisions of prior Acts, is not being properly maintained, he shall call such fact to the attention of the State transportation department. If, within ninety days after receipt of such notice, such project has not been put in proper condition of maintenance, the Secretary shall withhold approval of further projects of all types in the State highway district, municipality, county, other political or administrative subdivision of the State, or the entire State in which such project is located, whichever the Secretary deems most appropriate, until such project shall have been put in proper condition of maintenance.

(d) Preventive maintenance. – A preventive maintenance activity shall be eligible for Federal assistance under this title if the State demonstrates to the satisfaction of the Secretary that the activity is a cost-effective means of extending the useful life of a Federal-aid highway.

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49 U.S.C.A. § 31136

Current through P.L. 108-71, approved 08-14-03

(a) Minimum safety standards. – Subject to section 30103(a) of this title, the Secretary of Transportation shall prescribe regulations on commercial motor vehicle safety. The regulations shall prescribe minimum safety standards for commercial motor vehicles. At a minimum, the regulations shall ensure that –

(1) commercial motor vehicles are maintained, equipped, loaded, and operated safely;

(2) the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely;

(3) the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely; and

(4) the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators.

(b) Eliminating and amending existing regulations. – The Secretary may not eliminate or amend an existing motor carrier safety regulation related only to the maintenance, equipment, loading, or operation (including routing) of vehicles carrying material found to be hazardous under section 5103 of this title until an equivalent or more stringent regulation has been prescribed under section 5103.

(c) Procedures and considerations. – (1) A regulation under this section shall be prescribed under section 553 of title 5 (without regard to sections 556 and 557 of title 5).

(2) Before prescribing regulations under this section, the Secretary shall consider, to the extent practicable and consistent with the purposes of this chapter –

(A) costs and benefits; and

(B) State laws and regulations on commercial motor vehicle safety, to minimize their unnecessary preemption.

(d) Effect of existing regulations. – If the Secretary does not prescribe regulations on commercial motor vehicle safety under this section, regulations on commercial motor

vehicle safety prescribed by the Secretary before October 30, 1984, and in effect on October 30, 1984, shall be deemed in this subchapter to be regulations prescribed by the Secretary under this section.

(e) Exemptions. – The Secretary may grant in accordance with section 31315 waivers and exemptions from, or conduct pilot programs with respect to, any regulations prescribed under this section.

(f) Limitations on municipality and commercial zone exemptions and waivers. – (1) The Secretary may not –

(A) exempt a person or commercial motor vehicle from a regulation related to commercial motor vehicle safety only because the operations of the person or vehicle are entirely in a municipality or commercial zone of a municipality; or

(B) waive application to a person or commercial motor vehicle of a regulation related to commercial motor vehicle safety only because the operations of the person or vehicle are entirely in a municipality or commercial zone of a municipality.

(2) If a person was authorized to operate a commercial motor vehicle in a municipality or commercial zone of a municipality in the United States for the entire period from November 19, 1987, through November 18, 1988, and if the person is otherwise qualified to operate a commercial motor vehicle, the person may operate a commercial motor vehicle entirely in a municipality or commercial zone of a municipality notwithstanding –

(A) paragraph (1) of this subsection;

(B) a minimum age requirement of the United States Government for operation of the vehicle; and

(C) a medical or physical condition that –

(i) would prevent an operator from operating a commercial motor vehicle under the commercial motor vehicle safety regulations in title 49, Code of Federal Regulations;

(ii) existed on July 1, 1988;

(iii) has not substantially worsened; and

(iv) does not involve alcohol or drug abuse.

(3) This subsection does not affect a State commercial motor vehicle safety law applicable to intrastate commerce.

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49 U.S.C.A. § 31306

Current through P.L. 108-71, approved 08-14-03

(a) Definition. – In this section, "controlled substance" means any substance under section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 802) specified by the Secretary of Transportation.

(b) Testing program for operators of commercial motor vehicles. – (1)(A) In the interest of commercial motor vehicle safety, the Secretary of Transportation shall prescribe regulations that establish a program requiring motor carriers to conduct preemployment, reasonable suspicion, random, and post-accident testing of operators of commercial motor vehicles for the use of a controlled substance in violation of law or a United States Government regulation and to conduct reasonable suspicion, random, and post-accident testing of such operators for the

use of alcohol in violation of law or a United States Government regulation. The regulations shall permit such motor carriers to conduct preemployment testing of such employees for the use of alcohol.

(B) When the Secretary of Transportation considers it appropriate in the interest of safety, the Secretary may prescribe regulations for conducting periodic recurring testing of operators of commercial motor vehicles for the use of alcohol or a controlled substance in violation of law or a Government regulation.

(2) In prescribing regulations under this subsection, the Secretary of Transportation –

(A) shall require that post-accident testing of an operator of a commercial motor vehicle be conducted when loss of human life occurs in an accident involving a commercial motor vehicle; and

(B) may require that post-accident testing of such an operator be conducted when bodily injury or significant property damage occurs in any other serious accident involving a commercial motor vehicle.

(c) Testing and laboratory requirements. – In carrying out subsection (b) of this section, the Secretary of Transportation shall develop requirements that shall –

(1) promote, to the maximum extent practicable, individual privacy in the collection of specimens;

(2) for laboratories and testing procedures for controlled substances, incorporate the Department of Health and Human Services scientific and technical guidelines dated April 11, 1988, and any amendments to those guidelines, including mandatory guidelines establishing –

(A) comprehensive standards for every aspect of laboratory controlled substances testing and laboratory procedures to be applied in carrying out this section, including standards requiring the use of the best available technology to ensure the complete reliability and accuracy of controlled substances tests and strict procedures governing the chain of custody of specimens collected for controlled substances testing;

(B) the minimum list of controlled substances for which individuals may be tested; and

(C) appropriate standards and procedures for periodic review of laboratories and criteria for certification and revocation of certification of laboratories to perform controlled substances testing in carrying out this section;

(3) require that a laboratory involved in testing under this section have the capability and facility, at the laboratory, of performing screening and confirmation tests;

(4) provide that any test indicating the use of alcohol or a controlled substance in violation of law or a Government regulation be confirmed by a scientifically recognized method of testing capable of providing quantitative information about alcohol or a controlled substance;

(5) provide that each specimen be subdivided, secured, and labeled in the presence of the tested individual and that a part of the specimen be retained in a secure manner to prevent the possibility of tampering, so that if the individual's confirmation test results are positive the individual has an opportunity to have the retained part tested by a 2d confirmation test done independently at another certified laboratory if the individual requests the

2d confirmation test not later than 3 days after being advised of the results of the first confirmation test;

(6) ensure appropriate safeguards for testing to detect and quantify alcohol in breath and body fluid samples, including urine and blood, through the development of regulations that may be necessary and in consultation with the Secretary of Health and Human Services;

(7) provide for the confidentiality of test results and medical information (except information about alcohol or a controlled substance) of employees, except that this clause does not prevent the use of test results for the orderly imposition of appropriate sanctions under this section; and

(8) ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances.

(d) Testing as part of medical examination. – The Secretary of Transportation may provide that testing under subsection (a) of this section for operators subject to subpart E of part 391 of title 49, Code of Federal Regulations, be conducted as part of the medical examination required under that subpart.

(e) Rehabilitation. – The Secretary of Transportation shall prescribe regulations establishing requirements for rehabilitation programs that provide for the identification and opportunity for treatment of operators of commercial motor vehicles who are found to have used alcohol or a controlled substance in violation of law or a Government regulation. The Secretary shall decide on the circumstances under which those operators shall be required to participate in a program. This section does not prevent a

motor carrier from establishing a program under this section in cooperation with another motor carrier.

(f) Sanctions. – The Secretary of Transportation shall decide on appropriate sanctions for a commercial motor vehicle operator who is found, based on tests conducted and confirmed under this section, to have used alcohol or a controlled substance in violation of law or a Government regulation but who is not under the influence of alcohol or a controlled substance as provided in this chapter.

(g) Effect on State and local government regulations. – A State or local government may not prescribe or continue in effect a law, regulation, standard, or order that is inconsistent with regulations prescribed under this section. However, a regulation prescribed under this section may not be construed to preempt a State criminal law that imposes sanctions for reckless conduct leading to loss of life, injury, or damage to property.

(h) International obligations and foreign laws. – In prescribing regulations under this section, the Secretary of Transportation –

(1) shall establish only requirements that are consistent with international obligations of the United States; and

(2) shall consider applicable laws and regulations of foreign countries.

(i) Other regulations allowed. – This section does not prevent the Secretary of Transportation from continuing in effect, amending, or further supplementing a regulation prescribed before October 28, 1991, governing the use of alcohol or a controlled substance by commercial motor vehicle employees.

(j) Application of penalties. – This section does not supersede a penalty applicable to an operator of a commercial motor vehicle under this chapter or another law.

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49 U.S.C.A. § 31310

Current through P.L. 108-71, approved 08-14-03

(a) Blood alcohol concentration level. – In this section, the blood alcohol concentration level at or above which an individual when operating a commercial motor vehicle is deemed to be driving under the influence of alcohol is .04 percent.

(b) First violation or committing felony. – (1) Except as provided in paragraph (2) of this subsection and subsection (c) of this section, the Secretary of Transportation shall disqualify from operating a commercial motor vehicle for at least one year an individual –

(A) committing a first violation of driving a commercial motor vehicle under the influence of alcohol or a controlled substance;

(B) committing a first violation of leaving the scene of an accident involving a commercial motor vehicle operated by the individual;

(C) using a commercial motor vehicle in committing a felony (except a felony described in subsection (d) of this section);

(D) committing a first violation of driving a commercial motor vehicle when the individual's commercial driver's license is revoked, suspended, or canceled based on the individual's operation of a commercial motor vehicle or

when the individual is disqualified from operating a commercial motor vehicle based on the individual's operation of a commercial motor vehicle; or

(E) convicted of causing a fatality through negligent or criminal operation of a commercial motor vehicle.

(2) If the vehicle involved in a violation referred to in paragraph (1) of this subsection is transporting hazardous material required to be placarded under section 5103 of this title, the Secretary shall disqualify the individual for at least 3 years.

(c) Second and multiple violations. – (1) Subject to paragraph (2) of this subsection, the Secretary shall disqualify from operating a commercial motor vehicle for life an individual –

(A) committing more than one violation of driving a commercial motor vehicle under the influence of alcohol or a controlled substance;

(B) committing more than one violation of leaving the scene of an accident involving a commercial motor vehicle operated by the individual;

(C) using a commercial motor vehicle in committing more than one felony arising out of different criminal episodes;

(D) committing more than one violation of driving a commercial motor vehicle when the individual's commercial driver's license is revoked, suspended, or canceled based on the individual's operation of a commercial motor vehicle or when the individual is disqualified from operating a commercial motor vehicle based on the individual's operation of a commercial motor vehicle;

(E) convicted of more than one offense of causing a fatality through negligent or criminal operation of a commercial motor vehicle; or

(F) committing any combination of single violations or use described in subparagraphs (A) through (E).

(2) The Secretary may prescribe regulations establishing guidelines (including conditions) under which a disqualification for life under paragraph (1) of this subsection may be reduced to a period of not less than 10 years.

(d) Controlled substance violations. – The Secretary shall disqualify from operating a commercial motor vehicle for life an individual who uses a commercial motor vehicle in committing a felony involving manufacturing, distributing, or dispensing a controlled substance, or possession with intent to manufacture, distribute, or dispense a controlled substance.

(e) Serious traffic violations. – (1) The Secretary shall disqualify from operating a commercial motor vehicle for at least 60 days an individual who, in a 3-year period, commits 2 serious traffic violations involving a commercial motor vehicle operated by the individual.

(2) The Secretary shall disqualify from operating a commercial motor vehicle for at least 120 days an individual who, in a 3-year period, commits 3 serious traffic violations involving a commercial motor vehicle operated by the individual.

(f) Emergency disqualification. –

(1) Limited duration. – The Secretary shall disqualify an individual from operating a commercial motor vehicle for not to exceed 30 days if the Secretary determines that

allowing the individual to continue to operate a commercial motor vehicle would create an imminent hazard (as such term is defined in section 5102).

(2) After notice and hearing. – The Secretary shall disqualify an individual from operating a commercial motor vehicle for more than 30 days if the Secretary determines, after notice and an opportunity for a hearing, that allowing the individual to continue to operate a commercial motor vehicle would create an imminent hazard (as such term is defined in section 5102).

(g) Noncommercial motor vehicle convictions. –

(1) Issuance of regulations. – Not later than 1 year after the date of the enactment of this Act, the Secretary shall issue regulations providing for the disqualification by the Secretary from operating a commercial motor vehicle of an individual who holds a commercial driver's license and who has been convicted of –

(A) a serious offense involving a motor vehicle (other than a commercial motor vehicle) that has resulted in the revocation, cancellation, or suspension of the individual's license; or

(B) a drug or alcohol related offense involving a motor vehicle (other than a commercial motor vehicle).

(2) Requirements for regulations. – Regulations issued under paragraph (1) shall establish the minimum periods for which the disqualifications shall be in effect, but in no case shall the time periods for disqualification for non-commercial motor vehicle violations be more stringent than those for offenses or violations involving a commercial motor vehicle. The Secretary shall determine such

periods based on the seriousness of the offenses on which the convictions are based.

(h) State disqualification. – Notwithstanding subsections (b) through (g) of this section, the Secretary does not have to disqualify an individual from operating a commercial motor vehicle if the State that issued the individual a license authorizing the operation has disqualified the individual from operating a commercial motor vehicle under subsections (b) through (g). Revocation, suspension, or cancellation of the license is deemed to be disqualification under this subsection.

(i) Out-of-service orders. – (1)(A) To enforce section 392.5 of title 49, Code of Federal Regulations, the Secretary shall prescribe regulations establishing and enforcing an out-of-service period of 24 hours for an individual who violates section 392.5. An individual may not violate an out-of-service order issued under those regulations.

(B) The Secretary shall prescribe regulations establishing and enforcing requirements for reporting out-of-service orders issued under regulations prescribed under subparagraph (A) of this paragraph. Regulations prescribed under this subparagraph shall require at least that an operator of a commercial motor vehicle who is issued an out-of-service order to report the issuance to the individual's employer and to the State that issued the operator a driver's license.

(2) Not later than December 18, 1992, the Secretary shall prescribe regulations establishing sanctions and penalties related to violations of out-of-service orders by individuals operating commercial motor vehicles. The regulations shall require at least that –

(A) an operator of a commercial motor vehicle found to have committed a first violation of an out-of-service order shall be disqualified from operating such a vehicle for at least 90 days and liable for a civil penalty of at least $1,000;

(B) an operator of a commercial motor vehicle found to have committed a 2d violation of an out-of-service order shall be disqualified from operating such a vehicle for at least one year and not more than 5 years and liable for a civil penalty of at least $1,000; and

(C) an employer that knowingly allows or requires an employee to operate a commercial motor vehicle in violation of an out-of-service order shall be liable for a civil penalty of not more than $10,000.

(j) Grade-crossing violations. –

(1) Sanctions. – The Secretary shall issue regulations establishing sanctions and penalties relating to violations, by persons operating commercial motor vehicles, of laws and regulations pertaining to railroad-highway grade crossings.

(2) Minimum requirements. – The regulations issued under paragraph (1) shall, at a minimum, require that –

(A) the penalty for a single violation is not less than a 60-day disqualification of the driver's commercial driver's license; and

(B) any employer that knowingly allows, permits, authorizes, or requires an employee to operate a commercial motor vehicle in violation of such a law or regulation shall be subject to a civil penalty of not more than $10,000.

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CODE OF FEDERAL REGULATIONS

49 C.F.R. § 382.101
Current through August 5, 2003; 68 FR 46431

The purpose of this part is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles.

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49 C.F.R. § 382.103
Current through August 5, 2003; 68 FR 46431

(a) This part applies to every person and to all employers of such persons who operate a commercial motor vehicle in commerce in any State, and is subject to:

(1) The commercial driver's license requirements of part 383 of this subchapter;

(2) The Licencia Federal de Conductor (Mexico) requirements; or

(3) The commercial drivers license requirements of the Canadian National Safety Code.

(b) An employer who employs himself/herself as a driver must comply with both the requirements in this part that apply to employers and the requirements in this part that apply to drivers. An employer who employs only himself/herself as a driver shall implement a random alcohol and controlled substances testing program of two or more covered employees in the random testing selection pool.

(c) The exceptions contained in § 390.3(f) of this subchapter do not apply to this part. The employers and drivers identified in § 390.3(f) of this subchapter must comply

with the requirements of this part, unless otherwise specifically provided in paragraph (d) of this section.

(d) Exceptions. This part shall not apply to employers and their drivers:

(1) Required to comply with the alcohol and/or controlled substances testing requirements of part 655 of this title (Federal Transit Administration alcohol and controlled substances testing regulations); or

(2) Who a State must waive from the requirements of part 383 of this subchapter. These individuals include active duty military personnel; members of the reserves; and members of the national guard on active duty, including personnel on full-time national guard duty, personnel on part-time national guard training and national guard military technicians (civilians who are required to wear military uniforms), and active duty U.S. Coast Guard personnel; or

(3) Who a State has, at its discretion, exempted from the requirements of part 383 of this subchapter. These individuals may be:

(i) Operators of a farm vehicle which is:

(A) Controlled and operated by a farmer;

(B) Used to transport either agricultural products, farm machinery, farm supplies, or both to or from a farm;

(C) Not used in the operations of a common or contract motor carrier; and

(D) Used within 241 kilometers (150 miles) of the farmer's farm.

(ii) Firefighters or other persons who operate commercial motor vehicles which are necessary for the preservation of life or property or the execution of emergency governmental functions, are equipped with audible and visual signals, and are not subject to normal traffic regulation.

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49 C.F.R. § 382.107
Current through August 5, 2003; 68 FR 46431

Words or phrases used in this part are defined in §§ 386.2 and 390.5 of this subchapter, and § 40.3 of this title, except as provided in this section –

Actual knowledge for the purpose of subpart B of this part, means actual knowledge by an employer that a driver has used alcohol or controlled substances based on the employer's direct observation of the employee, information provided by the driver's previous employer(s), a traffic citation for driving a CMV while under the influence of alcohol or controlled substances or an employee's admission of alcohol or controlled substance use, except as provided in § 382.121. Direct observation as used in this definition means observation of alcohol or controlled substances use and does not include observation of employee behavior or physical characteristics sufficient to warrant reasonable suspicion testing under § 382.307.

Alcohol means the intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols including methyl and isopropyl alcohol.

Alcohol concentration (or content) means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath test under this part.

Alcohol use means the drinking or swallowing of any beverage, liquid mixture or preparation (including any medication), containing alcohol.

Commerce means:

(1) Any trade, traffic or transportation within the jurisdiction of the United States between a place in a State and a place outside of such State, including a place outside of the United States; and

(2) Trade, traffic, and transportation in the United States which affects any trade, traffic, and transportation described in paragraph (1) of this definition.

Commercial motor vehicle means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the vehicle –

(1) Has a gross combination weight rating of 11,794 or more kilograms (26,001 or more pounds) inclusive of a towed unit with a gross vehicle weight rating of more than 4,536 kilograms (10,000 pounds); or

(2) Has a gross vehicle weight rating of 11,794 or more kilograms (26,001 or more pounds); or

(3) Is designed to transport 16 or more passengers, including the driver; or

(4) Is of any size and is used in the transportation of materials found to be hazardous for the purposes of the Hazardous Materials Transportation Act (49 U.S.C. 5103(b)) and which require the motor vehicle to be placarded under the Hazardous Materials Regulations (49 CFR part 172, subpart F).

Confirmation (or confirmatory) drug test means a second analytical procedure performed on a urine specimen to identify and quantify the presence of a specific drug or drug metabolite.

Confirmation (or confirmatory) validity test means a second test performed on a urine specimen to further support a validity test result.

Confirmed drug test means a confirmation test result received by an MRO from a laboratory.

Consortium/Third party administrator (C/TPA) means a service agent that provides or coordinates one or more drug and/or alcohol testing services to DOT-regulated employers. C/TPAs typically provide or coordinate the provision of a number of such services and perform administrative tasks concerning the operation of the employers' drug and alcohol testing programs. This term includes, but is not limited to, groups of employers who join together to administer, as a single entity, the DOT drug and alcohol testing programs of its members (e.g., having a combined random testing pool). C/TPAs are not "employers" for purposes of this part.

Controlled substances mean those substances identified in § 40.85 of this title.

Designated employer representative (DER) is an individual identified by the employer as able to receive communications and test results from service agents and who is authorized to take immediate actions to remove employees from safety-sensitive duties and to make required decisions in the testing and evaluation processes. The individual must be an employee of the company. Service agents cannot serve as DERs.

Disabling damage means damage which precludes departure of a motor vehicle from the scene of the accident in its usual manner in daylight after simple repairs.

(1) Inclusions. Damage to motor vehicles that could have been driven, but would have been further damaged if so driven.

(2) Exclusions.

(i) Damage which can be remedied temporarily at the scene of the accident without special tools or parts.

(ii) Tire disablement without other damage even if no spare tire is available.

(iii) Headlight or taillight damage.

(iv) Damage to turn signals, horn, or windshield wipers which make them inoperative.

DOT Agency means an agency (or "operating administration") of the United States Department of Transportation administering regulations requiring alcohol and/or drug testing (14 CFR parts 61, 63, 65, 121, and 135; 49 CFR parts 199, 219, 382, and 655), in accordance with part 40 of this title.

Driver means any person who operates a commercial motor vehicle. This includes, but is not limited to: Full time, regularly employed drivers; casual, intermittent or occasional drivers; leased drivers and independent owner-operator contractors.

Employer means a person or entity employing one or more employees (including an individual who is self-employed) that is subject to DOT agency regulations requiring compliance with this part. The term, as used in this part,

means the entity responsible for overall implementation of DOT drug and alcohol program requirements, including individuals employed by the entity who take personnel actions resulting from violations of this part and any applicable DOT agency regulations. Service agents are not employers for the purposes of this part.

Licensed medical practitioner means a person who is licensed, certified, and/or registered, in accordance with applicable Federal, State, local, or foreign laws and regulations, to prescribe controlled substances and other drugs.

Performing (a safety-sensitive function) means a driver is considered to be performing a safety-sensitive function during any period in which he or she is actually performing, ready to perform, or immediately available to perform any safety-sensitive functions.

Positive rate means the number of positive results for random controlled substances tests conducted under this part plus the number of refusals of random controlled substances tests required by this part, divided by the total of random controlled substances tests conducted under this part plus the number of refusals of random tests required by this part.

Refuse to submit (to an alcohol or controlled substances test) means that a driver:

(1) Fail to appear for any test (except a pre-employment test) within a reasonable time, as determined by the employer, consistent with applicable DOT agency regulations, after being directed to do so by the employer. This includes the failure of an employee (including an owner-operator) to appear for a test when called by a C/TPA (see § 40.61(a) of this title);

(2) Fail to remain at the testing site until the testing process is complete. Provided, that an employee who leaves the testing site before the testing process commences (see § 40.63(c) of this title) a pre-employment test is not deemed to have refused to test;

(3) Fail to provide a urine specimen for any drug test required by this part or DOT agency regulations. Provided, that an employee who does not provide a urine specimen because he or she has left the testing site before the testing process commences (see § 40.63(c) of this title) for a pre-employment test is not deemed to have refused to test;

(4) In the case of a directly observed or monitored collection in a drug test, fails to permit the observation or monitoring of the driver's provision of a specimen (see §§ 40.67(l) and 40.69(g) of this title);

(5) Fail to provide a sufficient amount of urine when directed, and it has been determined, through a required medical evaluation, that there was no adequate medical explanation for the failure (see § 40.193(d)(2) of this title);

(6) Fail or declines to take a second test the employer or collector has directed the driver to take;

(7) Fail to undergo a medical examination or evaluation, as directed by the MRO as part of the verification process, or as directed by the DER under § 40.193(d) of this title. In the case of a pre-employment drug test, the employee is deemed to have refused to test on this basis only if the pre-employment test is conducted following a contingent offer of employment;

(8) Fail to cooperate with any part of the testing process (e.g., refuse to empty pockets when so directed by the

collector, behave in a confrontational way that disrupts the collection process); or

(9) Is reported by the MRO as having a verified adulterated or substituted test result.

Safety-sensitive function means all time from the time a driver begins to work or is required to be in readiness to work until the time he/she is relieved from work and all responsibility for performing work. Safety-sensitive functions shall include:

(1) All time at an employer or shipper plant, terminal, facility, or other property, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the employer;

(2) All time inspecting equipment as required by §§ 392.7 and 392.8 of this subchapter or otherwise inspecting, servicing, or conditioning any commercial motor vehicle at any time;

(3) All time spent at the driving controls of a commercial motor vehicle in operation;

(4) All time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth (a berth conforming to the requirements of § 393.76 of this subchapter);

(5) All time loading or unloading a vehicle, supervising, or assisting in the loading or unloading, attending a vehicle being loaded or unloaded, remaining in readiness to operate the vehicle, or in giving or receiving receipts for shipments loaded or unloaded; and

(6) All time repairing, obtaining assistance, or remaining in attendance upon a disabled vehicle. Screening test (or initial test) means:

(1) In drug testing, a test to eliminate "negative" urine specimens from further analysis or to identify a specimen that requires additional testing for the presence of drugs.

(2) In alcohol testing, an analytical procedure to determine whether an employee may have a prohibited concentration of alcohol in a breath or saliva specimen.

Stand-down means the practice of temporarily removing an employee from the performance of safety-sensitive functions based only on a report from a laboratory to the MRO of a confirmed positive test for a drug or drug metabolite, an adulterated test, or a substituted test, before the MRO has completed verification of the test results.

Violation rate means the number of drivers (as reported under § 382.305) found during random tests given under this part to have an alcohol concentration of 0.04 or greater, plus the number of drivers who refuse a random test required by this part, divided by the total reported number of drivers in the industry given random alcohol tests under this part plus the total reported number of drivers in the industry who refuse a random test required by this part.

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49 C.F.R. § 382.109
Current through August 5, 2003; 68 FR 46431

(a) Except as provided in paragraph (b) of this section, this part preempts any State or local law, rule, regulation, or order to the extent that:

(1) Compliance with both the State or local requirement in this part is not possible; or

(2) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in this part.

(b) This part shall not be construed to preempt provisions of State criminal law that impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees, employers, or the general public.

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49 C.F.R. § 382.205
Current through August 5, 2003; 68 FR 46431

No driver shall use alcohol while performing safety-sensitive functions. No employer having actual knowledge that a driver is using alcohol while performing safety-sensitive functions shall permit the driver to perform or continue to perform safety-sensitive functions.

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49 C.F.R. § 382.213
Current through August 5, 2003; 68 FR 46431

(a) No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver uses any controlled substance, except when the use is pursuant to the instructions of a licensed medical practitioner, as defined in § 382.107, who has advised the driver that the substance will not

adversely affect the driver's ability to safely operate a commercial motor vehicle.

(b) No employer having actual knowledge that a driver has used a controlled substance shall permit the driver to perform or continue to perform a safety-sensitive function.

(c) An employer may require a driver to inform the employer of any therapeutic drug use.

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49 C.F.R. § 382.215
Current through August 5, 2003; 68 FR 46431

No driver shall report for duty, remain on duty or perform a safety-sensitive function, if the driver tests positive or has adulterated or substituted a test specimen for controlled substances. No employer having actual knowledge that a driver has tested positive or has adulterated or substituted a test specimen for controlled substances shall permit the driver to perform or continue to perform safety-sensitive functions.

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49 C.F.R. § 382.303
Current through August 5, 2003; 68 FR 46431

(a) As soon as practicable following an occurrence involving a commercial motor vehicle operating on a public road in commerce, each employer shall test for alcohol for each of its surviving drivers:

(1) Who was performing safety-sensitive functions with respect to the vehicle, if the accident involved the loss of human life; or

(2) Who receives a citation within 8 hours of the occurrence under State or local law for a moving traffic violation arising from the accident, if the accident involved:

(i) Bodily injury to any person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or

(ii) One or more motor vehicles incurring disabling damage as a result of the accident, requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

(b) As soon as practicable following an occurrence involving a commercial motor vehicle operating on a public road in commerce, each employer shall test for controlled substances for each of its surviving drivers:

(1) Who was performing safety-sensitive functions with respect to the vehicle, if the accident involved the loss of human life; or

(2) Who receives a citation within thirty-two hours of the occurrence under State or local law for a moving traffic violation arising from the accident, if the accident involved:

(i) Bodily injury to any person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or

(ii) One or more motor vehicles incurring disabling damage as a result of the accident, requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

(c) The following table notes when a post-accident test is required to be conducted by paragraphs (a)(1), (a)(2), (b)(1), and (b)(2) of this section:

Table for § 382.303(a) and (b)

Type of accident involved	Citation issued to the CMV diver	Test must be performed by employer
i. Human fatality	YES	YES.
	NO	YES.
ii. Bodily injury with immediate medical treatment away from the scene	YES	YES.
	NO	NO.
iii. Disabling damage to any motor vehicle requiring tow away	YES	YES.
	NO	NO.

(d)(1) Alcohol tests. If a test required by this section is not administered within two hours following the accident, the employer shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this section is not administered within eight hours following the accident, the employer shall cease attempts to administer an alcohol test and shall prepare and maintain the same record. Records shall be submitted to the FMCSA upon request.

(2) Controlled substance tests. If a test required by this section is not administered within 32 hours following the accident, the employer shall cease attempts to administer a controlled substances test, and prepare and maintain on file a record stating the reasons the test was not promptly administered. Records shall be submitted to the FMCSA upon request.

(e) A driver who is subject to post-accident testing shall remain readily available for such testing or may be deemed by the employer to have refused to submit to testing. Nothing in this section shall be construed to require the delay of necessary medical attention for injured people following an accident or to prohibit a driver from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident, or to obtain necessary emergency medical care.

(f) An employer shall provide drivers with necessary post-accident information, procedures and instructions, prior to the driver operating a commercial motor vehicle, so that drivers will be able to comply with the requirements of this section.

(g)(1) The results of a breath or blood test for the use of alcohol, conducted by Federal, State, or local officials having independent authority for the test, shall be considered to meet the requirements of this section, provided such tests conform to the applicable Federal, State or local alcohol testing requirements, and that the results of the tests are obtained by the employer.

(2) The results of a urine test for the use of controlled substances, conducted by Federal, State, or local officials having independent authority for the test, shall be considered to meet the requirements of this section, provided such tests conform to the applicable Federal, State or local controlled substances testing requirements, and that the results of the tests are obtained by the employer.

(h) Exception. This section does not apply to:

(1) An occurrence involving only boarding or alighting from a stationary motor vehicle; or

(2) An occurrence involving only the loading or unloading of cargo; or

(3) An occurrence in the course of the operation of a passenger car or a multipurpose passenger vehicle (as defined in § 571.3 of this title) by an employer unless the motor vehicle is transporting passengers for hire or hazardous materials of a type and quantity that require the motor vehicle to be marked or placarded in accordance with § 177.823 of this title.

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49 C.F.R. § 382.501
Current through August 5, 2003; 68 FR 46431

(a) Except as provided in subpart F of this part, no driver shall perform safety-sensitive functions, including driving a commercial motor vehicle, if the driver has engaged in conduct prohibited by subpart B of this part or an alcohol or controlled substances rule of another DOT agency.

(b) No employer shall permit any driver to perform safety-sensitive functions; including driving a commercial motor vehicle, if the employer has determined that the driver has violated this section.

(c) For purposes of this subpart, commercial motor vehicle means a commercial motor vehicle in commerce as defined in § 382.107, and a commercial motor vehicle in interstate commerce as defined in part 390 of this subchapter.

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49 C.F.R. § 391.11
Current through August 5, 2003; 68 FR 46431

(a) A person shall not drive a commercial motor vehicle unless he/she is qualified to drive a commercial motor vehicle. Except as provided in § 391.63, a motor carrier shall not require or permit a person to drive a commercial motor vehicle unless that person is qualified to drive a commercial motor vehicle.

(b) Except as provided in subpart G of this part, a person is qualified to drive a motor vehicle if he/she –

(1) Is at least 21 years old;

(2) Can read and speak the English language sufficiently to converse with the general public, to understand highway traffic signs and signals in the English language, to respond to official inquiries, and to make entries on reports and records;

(3) Can, by reason of experience, training, or both, safely operate the type of commercial motor vehicle he/she drives;

(4) Is physically qualified to drive a commercial motor vehicle in accordance with subpart E – Physical Qualifications and Examinations of this part;

(5) Has a currently valid commercial motor vehicle operator's license issued only by one State or jurisdiction;

(6) Has prepared and furnished the motor carrier that employs him/her with the list of violations or the certificate as required by § 391.27;

(7) Is not disqualified to drive a commercial motor vehicle under the rules in § 391.15; and

(8) Has successfully completed a driver's road test and has been issued a certificate of driver's road test in accordance with § 391.31, or has presented an operator's license or a certificate of road test which the motor carrier that employs him/her has accepted as equivalent to a road test in accordance with § 391.33.

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49 C.F.R. § 391.15
Current through August 5, 2003; 68 FR 46431

(a) General. A driver who is disqualified shall not drive a commercial motor vehicle. A motor carrier shall not require or permit a driver who is disqualified to drive a commercial motor vehicle.

(b) Disqualification for loss of driving privileges.

(1) A driver is disqualified for the duration of the driver's loss of his/her privilege to operate a commercial motor vehicle on public highways, either temporarily or permanently, by reason of the revocation, suspension, withdrawal, or denial of an operator's license, permit, or privilege, until that operator's license, permit, or privilege is restored by the authority that revoked, suspended, withdrew, or denied it.

(2) A driver who receives a notice that his/her license, permit, or privilege to operate a commercial motor vehicle has been revoked, suspended, or withdrawn shall notify the motor carrier that employs him/her of the contents of the notice before the end of the business day following the day the driver received it.

(c) Disqualification for criminal and other offenses.

(1) General rule. A driver who is convicted of (or forfeits bond or collateral upon a charge of) a disqualifying offense specified in paragraph (c)(2) of this section is disqualified for the period of time specified in paragraph (c)(3) of this section, if –

(i) The offense was committed during on-duty time as defined in § 395.2(a) of this subchapter or as otherwise specified; and

(ii) The driver is employed by a motor carrier or is engaged in activities that are in furtherance of a commercial enterprise in interstate, intrastate, or foreign commerce;

(2) Disqualifying offenses. The following offenses are disqualifying offenses:

(i) Driving a commercial motor vehicle while under the influence of alcohol. This shall include:

(A) Driving a commercial motor vehicle while the person's alcohol concentration is 0.04 percent or more;

(B) Driving under the influence of alcohol, as prescribed by State law; or

(C) Refusal to undergo such testing as is required by any State or jurisdiction in the enforcement of § 391.15(c)(2)(i)(A) or (B), or § 392.5(a)(2).

(ii) Driving a commercial motor vehicle under the influence of a 21 CFR 1308.11 Schedule I identified controlled substance, an amphetamine, a narcotic drug, a formulation of an amphetamine, or a derivative of a narcotic drug;

(iii) Transportation, possession, or unlawful use of a 21 CFR 1308.11 Schedule I identified controlled substance, amphetamines, narcotic drugs, formulations of an amphetamine, or derivatives of narcotic drugs while the driver is on duty, as the term on-duty time is defined in § 395.2 of this subchapter;

(iv) Leaving the scene of an accident while operating a commercial motor vehicle; or

(v) A felony involving the use of a commercial motor vehicle.

(3) Duration of disqualification –

(i) First offenders. A driver is disqualified for 1 year after the date of conviction or forfeiture of bond or collateral if, during the 3 years preceding that date, the driver was not convicted of, or did not forfeit bond or collateral upon a charge of an offense that would disqualify the driver under the rules of this section. Exemption. The period of disqualification is 6 months if the conviction or forfeiture of bond or collateral solely concerned the transportation or possession of substances named in paragraph (c)(2)(iii) of this section.

(ii) Subsequent offenders. A driver is disqualified for 3 years after the date of his/her conviction or forfeiture of bond or collateral if, during the 3 years preceding that date, he/she was convicted of, or forfeited bond or collateral upon a charge of, an offense that would disqualify him/her under the rules in this section.

(d) Disqualification for violation of out-of-service orders.

(1) General rule. A driver who is convicted of violating an out-of-service order is disqualified for the period of time specified in paragraph (d)(2) of this section.

(2) Duration of disqualification for violation of out-of-service orders.

(i) First violation. A driver is disqualified for not less than 90 days nor more than one year if the driver is convicted of a first violation of an out-of-service order.

(ii) Second violation. A driver is disqualified for not less than one year nor more than five years if, during any 10-year period, the driver is convicted of two violations of out-of-service orders in separate incidents.

(iii) Third or subsequent violation. A driver is disqualified for not less than three years nor more than five years if, during any 10-year period, the driver is convicted of three or more violations of out-of-service orders in separate incidents.

(iv) Special rule for hazardous materials and passenger offenses. A driver is disqualified for a period of not less than 180 days nor more than two years if the driver is convicted of a first violation of an out-of-service order while transporting hazardous materials required to be placarded under the Hazardous Materials Transportation Act (49 U.S.C. 5101 et seq.), or while operating commercial motor vehicles designed to transport more than 15 passengers, including the driver. A driver is disqualified for a period of not less than three years nor more than five years if, during any 10-year period, the driver is convicted of any subsequent violations of out-of-service orders, in separate incidents, while transporting hazardous materials required to be placarded under the Hazardous Materials Transportation Act, or while operating commercial motor vehicles designed to transport more than 15 passengers, including the driver.

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49 C.F.R. § 391.41
Current through August 5, 2003; 68 FR 46431

(a) A person shall not drive a commercial motor vehicle unless he/she is physically qualified to do so and, except as provided in § 391.67, has on his/her person the original, or a photographic copy, of a medical examiner's certificate that he/she is physically qualified to drive a commercial motor vehicle.[1]

(b) A person is physically qualified to drive a commercial motor vehicle if that person –

(1) Has no loss of a foot, a leg, a hand, or an arm, or has been granted a skill performance evaluation certificate pursuant to § 391.49;

(2) Has no impairment of:

(i) A hand or finger which interferes with prehension or power grasping; or

---

[1] The United States and Canada entered into a Reciprocity Agreement, effective March 30, 1999, recognizing that a Canadian commercial driver's license is proof of medical fitness to drive. Therefore, Canadian commercial motor vehicle (CMV) drivers are no longer required to have in their possession a medical examiner's certificate if the driver has been issued, and possesses, a valid commercial driver's license issued by a Canadian Province or Territory. However, Canadian drivers who are insulin-using diabetics, who have epilepsy, or who are hearing impaired as defined in § 391.41(b)(11) are not qualified to drive CMVs in the United States. Furthermore, Canadian drivers who do not meet the medical fitness provisions of the Canadian National Safety Code for Motor Carriers but who have been issued a waiver by one of the Canadian Provinces or Territories are not qualified to drive CMVs in the United States.

(ii) An arm, foot, or leg which interferes with the ability to perform normal tasks associated with operating a commercial motor vehicle; or any other significant limb defect or limitation which interferes with the ability to perform normal tasks associated with operating a commercial motor vehicle; or has been granted a skill performance evaluation certificate pursuant to § 391.49.

(3) Has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control;

(4) Has no current clinical diagnosis of myocardial infarction, angina pectoris, coronary insufficiency, thrombosis, or any other cardiovascular disease of a variety known to be accompanied by syncope, dyspnea, collapse, or congestive cardiac failure.

(5) Has no established medical history or clinical diagnosis of a respiratory dysfunction likely to interfere with his/her ability to control and drive a commercial motor vehicle safely;

(6) Has no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial motor vehicle safely;

(7) Has no established medical history or clinical diagnosis of rheumatic, arthritic, orthopedic, muscular, neuromuscular, or vascular disease which interferes with his/her ability to control and operate a commercial motor vehicle safely;

(8) Has no established medical history or clinical diagnosis of epilepsy or any other condition which is

likely to cause loss of consciousness or any loss of ability to control a commercial motor vehicle;

(9) Has no mental, nervous, organic, or functional disease or psychiatric disorder likely to interfere with his/her ability to drive a commercial motor vehicle safely;

(10) Has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70<<degrees>> in the horizontal Meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber;

(11) First perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5 – 1951.

(12)(i) Does not use a controlled substance identified in 21 CFR 1308.11 Schedule I, an amphetamine, a narcotic, or any other habit-forming drug.

(ii) Exception. A driver may use such a substance or drug, if the substance or drug is prescribed by a licensed medical practitioner who:

(A) Is familiar with the driver's medical history and assigned duties; and

(B) Has advised the driver that the prescribed substance or drug will not adversely affect the driver's ability to safely operate a commercial motor vehicle; and

(13) Has no current clinical diagnosis of alcoholism.

GORDEAN ADELLA WINGFIELD, ET AL	* NUMBER 418,074 SECTION 15
VERSUS	* 19TH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, WILSON TRAILER COMPANY, INC.	* PARISH OF EAST BATON ROUGE
	* STATE OF LOUISIANA

CONSOLIDATED WITH

JACKIE MURRAY, SHARON ROY ROVNER, IVY J. WILLS AS LEGAL GUARDIAN AND ATTORNEY FOR JOSEPH EDWARD WINGFIELD, AND JOSEPH EDWARD WINGFIELD INDIVIDUALLY	* NUMBER 418,842 SECTION 12
	* 19TH JUDICIAL DISTRICT COURT
VERSUS	
STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, WILSON TRAILER COMPANY, INC.	* PARISH OF EAST BATON ROUGE
	* STATE OF LOUISIANA

MEMORANDUM IN SUPPORT OF DOTD'S MOTION FOR SUMMARY JUDGMENT ON BREACH OF DUTY OF KENNY CLARK

MAY IT PLEASE THE COURT:

DOTD files this memorandum in support of its motion for partial summary judgment that there is no genuine issue of material fact that Clark reported for duty and remained on duty, which duty required the performance of safety sensitive functions, after he used a controlled

dangerous substance, i.e., marijuana, and Clark should not have been operating a commercial motor vehicle in interstate commerce at the time of the accident which is the basis of this suit and, therefore, DOTD is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

On August 6, 1994, at about 5:55 a.m., Kenny Clark (Clark), an inexperienced commercial driver, was driving a rig hauling an aluminum forty-eight (48) foot cattle trailer, loaded with eighty (80) head of cattle westbound on I-10 through the city of Baton Rouge. Jack Ray Wingfield was a holder of a commercial driver's license (CDL) and was acting as Kenny Clark's supervisor on this trip. Prior to, and at the time of, the accident, Jack Wingfield was asleep in the sleeper cab not properly supervising Kenny Clark. Kenny Clark was the holder of only a learner's commercial driver's license permit.

LOCAL RULE VIII(D)(2)

1. Kenny Clark (Clark) was the driver of the commercial motor vehicle tractor trailer rig on August 6, 1994, at the time of the accident. (Exhibit A-Accident Report).

2. Clark has only a Commercial Driver's License (CDL) permit issued by the State of Arizona. (Exhibit B).

3. Baton Rouge Medical Center and Dynacare Laboratories found Clark's urine to be presumptive positive for the presence of cannabanoids. (Exhibit C).

4. A level of marijuana metabolites of 50 NG/ML was detected in the urine of Clark. (Exhibit D, depo of Jerry Harrison pg. 50).

5. Rosalyne R. Glaze, the forensic supervisor in the toxicology unit, performed a gas chromatography/ mass spectromoney (GCMS) on 9/15/94 which detected carboxy-THC in Clark's urine. (Exhibit E, depo of Rosaylne Glaze, pgs. 6, 39, and 42).

6. The testing procedures done on Clark's urine met the standards of the Tox Unit of the Crime Lab. (Exhibit F, depo of John Ricca, pg. 48 and 49).

7. Clark was unfit to operate a commercial motor vehicle. (Exhibit G, depo. of Thomas L. Kurt., pg. 16-18).

LAW AND ARGUMENT

The U.S. Department of Transportation (DOT), Federal Highway Administration (FHWA), had promulgated extensive regulations regarding the use of controlled dangerous substances and the operation of a commercial motor vehicle which are embodied in **49 C.F.R. § 382.101 et seq.** The contents of the Federal Register are required to be judicially noticed (**44 U.S.C. § 1507**). The Code of Federal Regulations is *prima facie* evidence of the text of the original documents (**44 U.S.C. § 1510**) DOTD moves the court to take judicial notice of the federal regulations attached hereto as Exhibit H.

49 C.F.R. § 382.103 provides that:

> "(a) This part applies to every person and to all employers of such persons who operate a commercial motor vehicle in commerce in any State, and is subject to:
>
> "(1) The commercial driver's license requirements of part 383 of this subchapter."

Clark was issued a leaner's permit from the state of Arizona pursuant to **49 C.F.R. § 383.23(c)**.

49 C.F.R. § 383.107 provides for the definitions of commercial motor vehicle and driver. The 80,000 pound tractor trailer hauling property (cattle) qualifies as a commercial motor vehicle and Clark was the driver under the definition of this section. Also, **49 C.F.R. § 383.107** provides that safety-sensitive function means:

> "All time from the time a driver begins work or is required to be in readiness to work until the time he/she is relieved from work and all responsibility for performing work. Safety-sensitive functions shall include:
>
> (3) All time spent at the driving controls of a commercial motor vehicle in operation; and
>
> (4) All time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth (a berth conforming to the requirements of § **383.76** of this subchapter."

The DOT, FHWA enacted these substantial regulations for the single purpose of reducing accident and injuries involving commercial motor vehicles and their drivers, such as Clark.

49 C.F.R. § 382.101 provides that:

> "The purpose of this part is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled dangerous substances by drivers of commercial motor vehicles"

In furtherance of this purpose, the DOT, FHWA has enacted the following provisions stating the duty of a

driver of commercial motor vehicle vis a vis controlled dangerous substance use in Subpart B.

49 C.F.R. § 382.213 provides that:

> "(a) No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver ***uses*** any controlled substance, . . . "

49 C.F.R. § 382.213 further provides that:

> "No driver shall report for duty or remain on duty or perform a safety-sensitive function, if the driver tests positive for controlled substances."

The EMIT tests from Baton Rouge General Hospital, Dynacare laboratories, and the Louisiana State Police Crime Lab (Crime Lab), and the confirmation GC/MS from the Crime Lab prove that Clark reported for, and remained on, duty requiring the performance of a safety-sensitive (driving a commercial motor vehicle and being aboard a commercial motor vehicle) function after he had used a controlled substance, i.e marijuana.

49 C.F.R. § 382.501 provides that:

> "(a) Except as provided in subpart F of this part, no driver shall perform safety sensitive functions, including a commercial motor vehicle, if the driver has engaged in conduct prohibited by subpart B of this part . . . "

Clark violated his duty under federal regulations by using marijuana and performing safety sensitive functions, including driving the tractor trailer hauling cattle. Therefore, it is clear that the DOTD, FHWA has adopted a "zero-tolerance" approach for operating a commercial

motor vehicle and the use of a controlled substance, such as marijuana. Clark should not only not have driven the vehicle on the date of the accident, but because of his use of marijuana use, he should not have even been on board the vehicle. If Clark would have obeyed the federal mandate and not disregarded his duty as a learner's permit holder of a CDL, this accident would not have occurred. Also, Clark was unfit for duty under the DOT regulations.

This statutory scheme enacted by DOT, FHWA is similar to Louisiana law, **LSA-R.S. 32:41-42** provides that:

> "B. (1)(a) Notwithstanding any other law to the contrary or Subsection A of this Section, an operator of a commercial motor vehicle shall not have any measured alcohol concentration ***or any detected presence of alcohol or a controlled dangerous substance while operating or taking part in operating, or in physical control of, a commercial motor vehicle***.

Louisiana has also adopted this no tolerance approach to controlled substance use and commercial drivers by decreeing that any detected presence of a controlled dangerous substance is a violation of the duty of a driver when operating a commercial motor vehicle. The importance of this Louisiana policy is further stated by the legislature by decreeing that the above cited section takes precedence over any other law. It is the clear intent of the Louisiana legislature that drivers, such as Clark, who use a controlled substance shall not operate a commercial motor vehicle.

The raging question in this litigation of how long prior to the accident did Kenny Clark smoke or ingest

marijuana and in what amount was present in his system at the time of the accident has been answered by both the DOT, FHWA and the Louisiana legislature. It is the policy and the intent of both the rational government and Louisiana legislature to have a policy of zero tolerance regarding commercial drivers and controlled substance use. The use of controlled substances by commercial drivers, such as in the case of Clark, has been determined to be rationally and legally related to accidents in which commercial drivers have the presence of detectable levels of controlled substances in their system.

CONCLUSION

DOTD is entitled to a judgment as a matter of law that Clark breached his duty as a driver of a commercial motor vehicle under both federal and state law and should not have been operating any commercial vehicle with any use of marijuana and violation of this duty is against the public policy of the United States and the State of Louisiana and his failure to abide by the rules and regulations a rational and legal cause of the accident.

BY ATTORNEYS
RICHARD P. IEYOUB
Attorney General

By: /s/ Stacey Moak
Stacey Moak, Bar Roll No. 9522
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11816 Sunray Ave., Suite A
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(225) 292-6820

CERTIFICATE

I hereby certify that a copy of the above and foregoing memorandum has been served on Mr. Charles R. Moore, MOORE, WALTERS, & THOMPSON, 6513 Perkins Road, Baton Rouge, LA, 70898-0359, attorney for the plaintiffs, Mr. Robert E. Kleinpeter, KLEINPETER, SCHWARTZBERG & STEVENS, 619 Jefferson Hwy., Ste. 2H, Baton Rouge, LA 70806, and Mr. David F. Bienvenu, HOFFMAN, SIEGEL, SEYDEL, BIENVENU & CENTOLA, 650 Poydras Street Suite 2100, New Orleans, LA 70130-6121, attorney for National Union Fire Insurance Company of Pittsburgh, by placing same in the United States Mail with proper postage and properly addressed.

Baton Rouge, Louisiana, this 27th day of November, 2000.

/s/ Stacey Moak
STACEY MOAK

GORDEAN ADELLA WINGFIELD, ET AL	* NUMBER 418,074 SECTION 15
VERSUS	* 19TH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, WILSON TRAILER COMPANY, INC.	* PARISH OF EAST BATON ROUGE
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JACKIE MURRAY, SHARON ROY ROVNER, IVY J. WILLS AS LEGAL GUARDIAN AND ATTORNEY FOR JOSEPH EDWARD WINGFIELD, AND JOSEPH EDWARD WINGFIELD INDIVIDUALLY	* NUMBER 418,842 SECTION 12
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STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, WILSON TRAILER COMPANY, INC.	* PARISH OF EAST BATON ROUGE
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SHOULD THE JURY KNOW OF KENNY CLARK'S POSITIVE MARIJUANA TEST

MAY IT PLEASE THE COURT:

In earlier memoranda, the plaintiffs have attempted to persuade the court that Kenny Clark's positive urine test for marijuana is not admissible because, among other objections, the test itself is not reliable, the test results if reliable do not prove that Kenny Clark was impaired or

intoxicated at the time of the accident, and even if they are wrong on the two previous objections the prejudice created by the test results outweighs its probative value. Meanwhile, the state has attempted to persuade the court to the contrary on all of these issues.

What should the court do under the circumstances? The state contends that all causes of the accident at issue are relevant and should be considered and decided by the jury. For example, the speed Kenny Clark was driving the tractor is an issue to be decided by the jury, just like whether he was under the influence of marijuana. Why do we have all of this motion practice about the marijuana issue and nothing about the speed of the vehicle? The issue of speed will be addressed through expert testimony based on expert interpretation of physical evidence such as skid marks, crush damage, and roadway damage as revealed in post-accident photographs; and the testimony about the speed at which the truck was traveling is greatly different in the opinion of the experts. The jury will have to decide which expert, if either, to believe on the issue of speed.

* * *

The rationale for this line of jurisprudence should be obvious. A motorist who brings suit claiming a defect in the roadway caused his accident must permit the defendant, DOTD, the opportunity to reasonably prove that the motorist himself was the cause of the accident and not the defect alleged. Otherwise, the defendant is forced to go to trial without all of the relevant evidence including whether the motorist was reasonably prudent under the

circumstances and thereby denied the right of civil due process.

We must not lose sight of the fact that under the circumstances had Kenny Clark, submitted to that same test as required by DOT regulations and if confirmed, which is 98% probable, his license, would immediately be revoked. Consequently, we have a positive test that is absolutely connected to the issue of safe driving. It is obvious that a truck driver who tests positive for marijuana is not exercising the high degree of care required of a professional truck driver; and also Kenny Clark was not even exercising the reasonable care of an ordinary driver. Our law contemplates a professional driver will exercise a higher degree of care than the average motorist. ***Hurts v. Woodis***, 95 2166 (La.App. 1 Cir. 6/28/96); 676 So.2d 1166, 1173.

The test is also admissible as part of the hospital records. "Due to the inherent reliability of hospital records, under Louisiana law, such records are admissible pursuant to **LSA-R.S. 13:3714**, without the necessity for laying a foundation. Certified medical records are to be admitted into evidence as prima facie proof of its contents. The statute provides as follows:

> 'Whenever a certified copy of the chart or record of any hospital, signed by the administrator or the medical records librarian of the hospital in question, is offered in evidence in any court of competent jurisdiction, it shall be received in evidence by such court as prima facie proof of its contents, provided that the party against whom the record is sought to be used may summon and examine those making the original of said record as witnesses under cross-examination.'"

Richardson v. Kansas City Southern Ry. Co., 31-735 (La.App. 2 Cir. 4/1/99) 631 So.2d 1017, 1021-1022

The marijuana test at issue is contained in Kenny Clark's medical records from Baton Rouge General Hospital. The positive test for marijuana is, therefore, prima facie proof that at the time of the accident Kenny Clark was under the influence of or using marijuana contrary to the provisions of the DOT motor carrier safety laws **40 C.F.R. § 382.213 and 382.215** (Exhibit A) and the reasonable care of a professional truck driver. **LSA-C.E. art 308**. Certainly the plaintiffs may attempt to rebut this presumption at trial. This writer submits that the rebuttal of this presumption must be by clear and convincing evidence. The DOT regulations clearly state a policy on part of the department to improve safety that no driver shall perform safety-sensitive functions when the driver ***uses*** any controlled substance. It is clear that the plaintiffs can not dispute the fact that Kenny Clark was using marijuana in violation of **40 C.F.R. § 382.213**.

Clear and convincing evidence is a heavier burden than the "preponderance of the evidence" standard but is less than the "beyond a reasonable doubt" standard. ***Bundren v. Affiliated Nursing Homes, Inc.***, 649 So.2d 1177 (La.App. 3 Cir.1995). The clear and convincing evidence standard requires more than a "preponderance of the evidence" but less than "beyond a reasonable doubt." **The existence of the disputed fact must be highly probable, that is much more probable than** its **non-existence**. This standard of proof is usually reserved for cases where strong policy considerations mitigate against the use of the preponderance of the evidence standard. ***Succession of Young***, 96-1206

(La.App. 3 Cir. 3/5/97); 692 So.2d 1149, 1151. This standard should certainly be applied in cases where impairment by drug use is at issue.

CONCLUSION

Plaintiffs' assertion that DOTD must prove at pre-trial motions that Kenny Clark was intoxicated at the time of the accident is not supported by the jurisprudence. For DOTD's comparative fault claim against Kenny Clark for his marijuana use and its affect on the cause of the accident, DOTD need only prove that Kenny Clark's marijuana use was more probable than not a cause of the accident. The state does not have to prove this fact to a medical certainty as the plaintiffs allege. DOTD submits that Kenny Clark's positive Syva Emit test above 100NG/ML, makes his impairment at the time of the accident more probable rather than less probable as the plaintiffs claim.

Therefore, plaintiffs' motion for summary judgment and motions *in limine* on the marijuana issue should be denied and the evidence should be placed before the trier of fact for their determination.

RICHARD P. IEYOUB
ATTORNEY GENERAL

/s/ Douglas M. Chapoton
Douglas M. Chapoton, Bar Roll No. 25616
Stacey Moak, Bar Roll No. 9522
Special Assistant Attorney General
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Tel. 225/292-6820

CERTIFICATE

I hereby certify that a copy of the above and foregoing memorandum has been served on Charles R. Moore, Moore, Walters & Thompson, 6513 Perkins Road, Baton Rouge, LA, 70898-0359, attorney for the plaintiffs, Mr. Robert E. Kleinpeter, Kleinpeter, Schwartzberg & Stevens, 619 Jefferson Hwy., Ste. 2H, Baton Rouge, LA 70806, and David F. Bienvenu, Hoffman, Siegel, Seydel, Bienvenue & Centola, 650 Poydras Street Suite 2100, New Orleans, LA 70130-6121, attorney for National Union Fire Insurance Company of Pittsburgh by placing the same in the U.S. mail proper postage pre-paid and properly addressed.

Baton Rouge, Louisiana this 11th day of January, 2000.

/s/ Douglas M. Chapoton
Douglas M. Chapoton

GORDEAN ADELLA WINGFIELD, ET AL	* NUMBER 418,074 SECTION 15
VERSUS	* 19TH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, WILSON TRAILER COMPANY, INC.	* PARISH OF EAST BATON ROUGE
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JACKIE MURRAY, SHARON ROY ROVNER, IVY J. WILLS AS LEGAL GUARDIAN AND ATTORNEY FOR JOSEPH EDWARD WINGFIELD, AND JOSEPH EDWARD WINGFIELD INDIVIDUALLY	* NUMBER 418,842 SECTION 12
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STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, WILSON TRAILER COMPANY, INC.	* PARISH OF EAST BATON ROUGE
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MEMORANDUM IN OPPOSITION TO PLAINTIFFS' JOINT MOTION *IN LIMINE* ON THE MARIJUANA ISSUE

MAY IT PLEASE THE COURT:

DOTD provides this memorandum in opposition to plaintiffs' joint motion *in limine* to exclude all evidence of driver intoxication or drug use.

The issue before this court in this motion *in limine* to exclude evidence is whether the impairment of Kenny Clark by marijuana use is relevant to the cause of the tractor trailer accident on August 6, 1994, which forms the subject matter of this suit and whether Kenny Clark's marijuana use while holding a commercial driver's license and employed by Wingfield Livestock Transportation (WLT) is relevant.

LAW AND ARGUMENT

DOTD has addressed the issue of Kenny Clark's marijuana impairment twice in the summary judgment motion of plaintiffs, but will summarize its argument on the evidence's relevance in light of this motion *in limine*.

Plaintiffs claim that the exclusion of all evidence of marijuana use by Kenny Clark is a "textbook" case for the application of **LSA-C.E. art. 403.** Despite plaintiffs argument in their memorandum, DOTD submits that it is not attempting to inflame the jury or confuse it on the issue of the marijuana usage of Kenny Clark. DOTD submits that the issue is relevant concerning the cause of the accident. Granted, evidence the Kenny Clark was impaired by marijuana use at the time of this accident would be highly prejudicial to the plaintiffs case. However, it is extremely relevant as to the cause of the accident and why Kenny Clark did not operate the vehicle in this elevated turn on I-10 in a proper manner. If evidence is relevant and otherwise admissible, the fact that it is prejudicial does not bar its admission. ***State v. Morgan***, 444 So.2d 325 (La.App. 1 Cir. 1983). Because the evidence bears directly on the important issue of causation, then it is relevant and admissible.

The plaintiffs also seem to indicate that DOTD needs to present proof beyond a reasonable doubt that Kenny Clark was impaired by marijuana use at the time of this accident. DOTD needs only to prove their affirmative defense of comparative fault by a preponderance of the evidence.

Furthermore, because comparative negligence is an affirmative defense that must be specifically pleaded, the defendant bears the burden of proving it by a preponderance of the evidence. ***Smith v. Jack Dyer & Associates, Inc.***, 633 So.2d 694, 699 (La.App. 1 Cir. 1993) *citing* ***Bergeron v. K-Mart Corporation***, 540 So.2d 406, 408 (La.App. 1st Cir.), *writs denied*, 544 So.2d 408 *and* 544 So.2d 412 (La.1989).

Plaintiffs again argue that the Syva EMIT test alone is not sufficient to prove intoxication. The EMIT test, even though plaintiffs claim that has no value, is 95% accurate according to William J. George, Ph.D. (Exhibit A-attached to DOTD's memorandum in opposition to motion for summary judgment) and James Garriott, Ph.D.[1] If it is 95% accurate that clearly meets the preponderance of the evidence standard for the fact Kenny Clark was an active user of marijuana. (Exhibit A-Dr. George-deposition pg. 20). Combined with the fact that Kenny Clark was traveling at a high rate of speed and did not brake or steer properly proves that more probable than not Kenny Clark was impaired at the time of his accident. (Exhibit A).

---

[1] Dr. Garriott's deposition will be provided to the court upon receipt by DOTD.

The facts of this case are clear and it is not "wistful thinking" that Kenny Clark was impaired at the time of this accident. The evidence of this case points to one conclusion that Kenny Clark was impaired by marijuana use and that use was a cause of the accident.

II. Kenny Clark's Prior Drug Use

Plaintiffs submit that Kenny Clark's prior marijuana use is a non-issue. However, the facts and circumstances dictate that it is extremely relevant not only in the assessment of fault against Kenny Clark but also the assessment of fault against Wingfield Livestock Transportation.

Kenny Clark was a holder of a commercial driver's license learner's permit. Professional truck drivers have a capacity superior to that of the ordinary car driver. ***Hurts v. Woodis***, 95 2166 (La.App. 1 Cir. 6/28/96); 676 So.2d 1166, 1173. The Department of Transportation and the states heavily regulate the commercial trucking business. Specifically, DOT set out many regulations prohibiting drivers who use controlled substances such as marijuana from operating commercial vehicles such as the one involved in this accident. **49 C.F.R. § 382.213**. (Exhibit A). **49 C.F.R. § 382.215** (Exhibit A) states that a driver (Kenny Clark) will not report to work if the driver tests positive for a controlled substance. This regulation also states that an employer will no allow a driver to drive a vehicle (perform safety sensitive functions) if he tests positive for a controlled substance. **49 C.F.R. § 383.51** states that a driver is disqualified if he drives under the influence of a controlled substance. (Exhibit B). The DOT has also placed a substantial burden on the employer to

discover by periodic drug tests whether its drivers are using controlled substances.

DOTD submits that Kenny Clark while employed as a driver at WLT was an active user of a controlled substance, marijuana. Kenny Clark should not have been operating a commercial motor vehicle while using marijuana.

DOTD submits that the accident would not have occured except for Kenny Clark's violation of controlled substances use laws for professional drivers.

CONCLUSION

The EMIT test and Kenny Clark's prior drug use are all relevant factors that must be considered by the trier of fact in its determination of this case. The motion *in limine* should be denied.

BY ATTORNEYS
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VERSUS	
STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, WILSON TRAILER COMPANY, INC.	

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO EXCLUDE THE EXPERT TESTIMONY OF THOMAS KURT, M.D. AND GARY WIMBISH, Ph.D., FOLLOWING A LSA-C.E. ART. 104 HEARING, AND ALL EVIDENCE REGARDING MARIJUANA.

MAY IT PLEASE THE COURT:

The State of Louisiana, through the Department of Transportation and Development, (DOTD) and National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union") submit this memorandum in response to plaintiffs' motion to exclude the testimony of Thomas L. Kurt, M.D. ("Kurt") and Gary H. Wimbish, Ph.D. ("Wimbish") concerning whether the accident that forms the subject matter of this litigation was caused by the use of marijuana and its effects on Kenny Clark (Clark).

STATEMENT OF FACTS

The plaintiffs have filed a *Daubert* motion to exclude the testimony of Kurt and Wimbish based on several factors which defendants will address. The major facts of this case that defendants will point out is that Clark's urine was tested four (4) times, by the Syva EMIT screening test, which was confirmed by gas chromatography/mass spectrometry (GC/MS). There is no question of fact that Clark was a learner's permit holder of a commercial driver's license who had used marijuana while on duty in violation of federal and Louisiana law.

* * *

(Baton Rouge General) Hospital found Clark's urine to be presumptive positive for cannabanoids. Dynacare performed two EMIT tests which found Clark's urine to be presumptive positive for cannabanoids at 20 ng/ml and 100 ng/ml, respectively. All experts at the hearing will testify that the EMIT test is known in scientific circles as a reliable test for screening the amount of cannabanoids in a person's urine.

The Crime Lab ran an EMIT test and also found Clark's urine to be presumptive positive for cannabanoids at 50 ng/ml or greater. This was confirmed by GC/MS. The testing done by the Crime Lab was done pursuant to the post-accident testing requirements promulgated by the federal government. The testing procedures done on Clark's urine met the standards of the Tox Unit of the Crime Lab. (Exhibit C, depo of John Ricca, pg. 48 and 49). See **49 C.F.R. § 382.303**. The testing procedures of the Crime Lab are the standards established by Louisiana law. **LSA-R.S. 32:414.2(C)(2)**

> "The procedures for testing commercial motor vehicle operators for alcohol or controlled substances, and for reporting the results shall, with any appropriate modifications, ***be the same as for other drivers***."

Plaintiffs have taken the approach, as stated in their memorandum at page 13, that defendants' experts should be disqualified as:

> "[w]ithout an actual quantification of THC, CARBOXY-THC, HYDROXY-THC in Clark's blood, . . . defendant's experts are forced to determine intoxication based solely upon urine levels of Carboxy-THC."

According to plaintiffs, this cannot be done; however defendants are not attempting to infer impairment solely from the Carboxy-THC levels in Clark's urine.

The six tests which proved Carboxy-THC at a level of 100 ng/ml or greater is not the only fact upon which defendants' experts rely. Plaintiffs brush aside the fact that all of these tests were done within a short period of time after Clark's accident. The facts of this case are that

Clark was driving an eighteen wheel double deck cattle-trailer at a speed of approximately (60) sixty mph, that he entered a curve marked with two overhead retro-reflective curve advisory signs with (35) thirty-five mph speed limit signs, a (35) thirty-five mph speed limit sign with a blinking yellow warning light, a lighted guidance tube, and chevrons and that he did not react properly, showing slowed response to this traffic situation. In fact, all the scientific literature concerning marijuana effects on a driver's physco motor performance and/or ability to drive were not based solely on marijuana concentrations in the subjects. (Exhibit D See Stephen J. Heisman, Maryland A. Huestis, Jack E. Hennington, and Edward J. Cone. *Acute and Residual affects of marijuana: Profiles of Plasma THC levels*

* * *

RESPONSE TO PLAINTIFFS' CONTENTIONS IN PART (D)

Plaintiff's claim that Kurt and Wimbish's opinions must be relevant to the issue of legal intoxication in order to be admissible under the LSA-C.E. art. 401 and 403 balancing test.

> "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. LSA-C.E. art. 401. ***Unless an exception is provided by law, all relevant evidence is admissible***, LSA.-C.E. art. 402. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the

> issues, or misleading the jury, or by considerations of undue delay, or waste of time. LSA.-C.E. art. 403, (Emphasis added).

Nicholas v. Allstate Ins. Co., 30-735 (La.App. 2 Cir. 5/28/99); 739 So.2d 830, 841.

Kenny Clark's six (6) positive urine tests for marijuana and the opinions of Kurt and Wimbish will have the tendency to make the existence of a fact, i.e. the cause of Clark's accident, more probable than without the evidence. The evidence, of course, is prejudicial to the plaintiffs but is is more relevant than prejudicial, given the facts of this case. Defendants will be able to show from the scientific tests and the nature of the accident that Clark was impaired. Additionally, Clark, as a holder of CDL learner's permit, is prohibited by both federal and state law from operating a commercial motor vehicle when he uses a controlled substance or a detectable amount of controlled substance is found in his urine, 49 C.F.R. § 382.213 and LSA-R.S. 32:414.2(B)(1)(a). Any prejudicial affect that this evidence may have is out-weighed by the interest of the DOT and the Louisiana Legislature to protect the public from commercial drivers who are driving under the influence of controlled substances. Clark's marijuana use as a commercial driver goes to the heart of the issue of whether he was a reasonable driver.

* * *

GORDEAN ADELLA WINGFIELD, ET AL	*NUMBER 418,074 SECTION 15
VERSUS	*19TH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, WILSON TRAILER COMPANY, INC.	*PARISH OF EAST BATON ROUGE *STATE OF LOUISIANA

CONSOLIDATED WITH

JACKIE MURRAY, SHARON ROY ROVNER, IVY J. WILLS AS LEGAL GUARDIAN AND ATTORNEY FOR JOSEPH EDWARD WINGFIELD, AND JOSEPH EDWARD WINGFIELD INDIVIDUALLY	*NUMBER 418,842 SECTION 12
	*19TH JUDICIAL DISTRICT COURT
	*PARISH OF EAST BATON ROUGE
	*STATE OF LOUISIANA
VERSUS	
STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, WILSON TRAILER COMPANY, INC.	

DOTD'S MOTION FOR SUMMARY JUDGMENT ON FEDERAL PREEMPTION OF LOUISIANA TORT LAW

NOW INTO COURT, through undersigned counsel, comes the State of Louisiana, through the Department of

Transportation and Development (DOTD), made defendant in the above entitled and captioned cause, who seeks a summary judgment on the issue that federal law preempts Louisiana tort law. As a consequence of this preemption, the plaintiffs may not properly seek damages from DOTD based alleged defects in the design or signage of the roadway, including maintenance of the roadway and signs.

1.

There is no genuine issue of material fact that the specifications of the design of the Baton Rouge Interstate Route, East Approach-Mississippi River Bridge, in East Baton Rouge Parish, route no. I-10, State of Louisiana, Department of Highways, State Highway Project No. 450-10-11 which is Federal Aid Project no. I-10-3(30)156 were approved prior to construction by officials of the Department of Commerce, Bureau of Public Roads on May 23, 1955.

2.

There is no genuine issue of material fact that State Project No. 450-10-11 and Federal Aid Project No. 1-10-3(30)156 was contracted at cost of construction in the amount of $6,273,890.78 Lyman G. Youngs, Division Engineer, U.S. Department of Commerce, Bureau of Roads.

3.

There is no genuine issue of material fact that State Project No. 450-10-11 and Federal Aid Project No. 1-10-3(30)156 began on or about April 6, 1962. Actual construction on said project began on or about May 5, 1966, and was completed on August 7, 1967.

4.

There is no genuine issue of material fact that the roadway and signage design, including all changes, for State Project No. 450-10-11 and Federal Aid Project No. I-10-3(30)156 were reviewed and approved before construction by the U.S. Department of Commerce, Bureau of Public Roads.

5.

There is no genuine issue of material fact that the two (2) sign trusses located immediately in advance of the elevated I-10 bridge approach ramp were part of State Project No. 450-10-11 and Federal Aid Project No. I-10-3(30)156 and their design and location were approved by the U.S. Department of Commerce, Bureau of Public Roads.

6.

There is no genuine issue of material fact that ninety (90) percent of the costs of the design and construction of State Project No. 450-10-11 and Federal Aid Project No. I-10-3(30)156 was from the U.S. government.

7.

There is no genuine issue of material fact that on August 6, 1994, an accident involving Kenny Clark and Jack Ray Wingfield occurred on Interstate 10 westbound on the elevated bridge approach ramp which was constructed as part of State Project No. 450-10-11 and Federal Aid Project No. I-10-3(30)156.

8.

There is no genuine issue of material fact that at the time of the aforementioned accident, the construction design of the elevated bridge approach ramp, where the accident occurred, had not been changed from the original design approved by the U.S. Department of Commerce, Bureau of Public Roads on or about August of 1967.

9.

There is no genuine issue of material fact the following signs were in place in advance of and at the I-10/I-110 interchange in East Baton Rouge Parish, Louisiana, in August 1994:

a. Variable message sign (VMS).
b. Flashing 35-mile per hour truck speed limit sign.
c. A dual set of overhead curve warning signs with 35-mile per hour advisory speeds.
d. Lighted guidance tube system.
e. Chevron signs placed on the bridge approach ramp with yellow backgrounds and black arrows.

10.

There is no genuine issue of material fact that the I-10/I-110 VMS project, including the sign itself was funded

ninety percent (90%) by the U.S. Government and ten percent (10%) by DOTD.

11.

There is no genuine issue of material fact that the I-10/I-110 VMS project was approved by the Federal Highway Administration (FHWA), including its specification, the bidding process to obtain the sign, and its placement on the particular overhead sign truss in advance of the I-10/I-110 interchange in East Baton Rouge Parish, Louisiana.

12.

There is no genuine issue of material fact that all of the signs listed in paragraph no. 9, together with their size and location, were approved by the FHWA pursuant to federal rules and internal processes of the DOTD, before they were installed on I-10 in the westbound approach to the I-10/I-110 interchange in East Baton Rouge Parish Louisiana.

13.

For the above stated reasons and further reasons expressed in the accompanying memorandum the DOTD is entitled to a judgment holding that as a matter of law that federal law preempts Louisiana state tort law. As a consequence of this preemption, the plaintiffs may not properly seek damages from DOTD based alleged defects in the design or signage of the road way, including maintenance of the roadway and signs.

WHEREFORE, DOTD prays that its motion for summary judgment be deemed good and sufficient and

that the plaintiffs', Wingfield and Murray, suits be dismissed with prejudice.

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IN THE SUPREME COURT STATE OF LOUISIANA

DOCKET NO. _____

****

GORDEAN ADELLA WINGFIELD, INDIVIDUALLY AND AS GUARDIAN AND CONSERVATOR OF THE ESTATE OF HER MINOR SON, KENNY CLARK

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, ET AL

CONSOLIDATED WITH

JACKIE MURRAY, SHARON ROY ROVNER, IVY J. WILLS AS LEGAL GUARDIAN AND ATTORNEY FOR JOSEPH EDWARD WINGFIELD AND JOSEPH EDWARD WINGFIELD INDIVIDUALLY

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, ET AL

HONORABLE J. MICHAEL MCDONALD
19TH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE DIV. H, DOCKET NO. 418,074 c/w 418,842

COURT OF APPEAL, FIRST CIRCUIT
DOCKET NO. 00 CW 2568

****

APPLICATION FOR SUPERVISORY WRITS AND RELIEF BY STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, AND NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA DEFENDANTS,

DIRECTED TO THE SUPREME COURT OF THE STATE OF LOUISIANA

****

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The State of Louisiana, through the Department
of Transportation and Development
Defendant/Applicant

VOLUME I
Application For Supervisory Writs
Pages 1-16

* * *

TO THE HONORABLE, THE SUPREME COURT OF THE STATE OF LOUISIANA:

APPLICATION FOR WRIT OF CERTIORARI OR REVIEW BY THE STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

The petition of the State of Louisiana, thought the Department of Transportation and Development, defendant and applicant in this matter, respectfully represents and shows that:

1.

Applicant is aggrieved by the judgment of the Court of Appeal, First Circuit, in which matter DOTD was an applicant to an application for a writ of certiorari or review taken on its behalf from judgment of the Honorable J. Michael McDonald, Judge presiding, 19th judicial District Court, Parish of East Baton Rouge, Div. H, denying DOTD's motion for summary judgment on federal preemption.

2.

Applicant shows that the following considerations under Section 1(a) of Rule X are present in this case and justify review by this Court:

(a) This case involves an erroneous interpretation and application of the Constitution and laws of the United States of America. This erroneous interpretation will cause material injustice to the applicant herein and adversely affect the public interest.

3.

Applicants attach to this application all of the pleadings, documents, and attachments required by Rule X of this Court and respectfully requests the Court to review this matter under the supervisory jurisdiction of the Court.

* * *

ISSUES AND QUESTIONS OF LAW PRESENTED FOR DETERMINATION

1. Did the U.S. Congress intend to occupy the field in the areas of the design, construction, maintenance, and

signage on the Interstate Highway System thereby pre-empting state tort law in the same fields?

2. Does federal law preempt Louisiana state tort law because Louisiana state tort law conflicts with the federal law on design, construction, maintenance, and signage on the Interstate Highway System making compliance with both federal and state regulations a physical impossibility; and does Louisiana tort law stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress?

ASSIGNMENT OF ERROR

The trial court erred in denying DOTD's motion for summary judgment on federal preemption.

SUMMARY OF THE ARGUMENT

This accident occurred on Interstate 10 which forms part of the Dwight D. Eisenhower National System of Interstate and Defense Highways. The U.S. Congress by enacting **23 U.S.C. A. § 101 et seq** occupied the field in the areas of design, construction, maintenance, and signage on the Interstate Highway System. The Interstate is an area of uniquely federal interest and is so committed to federal control, state law is preempted.

State tort law is preempted by federal law because the design, construction, maintenance, and signage on the Interstate System was approved by the Bureau of Public Roads, Department of Commerce and/or the Federal Highway/Administration Department of Transportation

thereby creating a federal standard which state tort law can not contradict.

* * *

IN THE SUPREME COURT OF LOUISIANA

DOCKET NO. _____

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GORDEAN ADELLA WINGFIELD,
INDIVIDUALLY AND AS GUARDIAN AND
CONSERVATOR OF THE ESTATE OF
HER MINOR SON, KENNY CLARK

VERSUS

STATE OF LOUISIANA, THROUGH THE
DEPARTMENT OF TRANSPORTATION AND
DEVELOPMENT, ET AL

CONSOLIDATED WITH

JACKIE MURRAY, SHARON ROY ROVNER,
IVY J. WILLS AS LEGAL GUARDIAN AND
ATTORNEY FOR JOSEPH EDWARD WINGFIELD
AND JOSEPH EDWARD WINGFIELD INDIVIDUALLY

VERSUS

STATE OF LOUISIANA, THROUGH THE
DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT, ET AL.

HONORABLE J. MICHAEL MCDONALD
19TH JUDICIAL DISTRICT COURT,
PARISH OF EAST BATON ROUGE
DIV. H, DOCKET NO. 418,074 c/w 418,842

COURT OF APPEAL,
FIRST CIRCUIT DOCKET NO. 2001 CW 0122

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APPLICATION FOR SUPERVISORY WRITS AND RELIEF BY STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, AND NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA DEFENDANTS,

DIRECTED TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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VOLUME I
Application For Supervisory Writs
pages 1-16

* * *

TO THE HONORABLE, THE SUPREME COURT OF THE STATE OF LOUISIANA:

APPLICATION FOR WRIT OF CERTIORARI OR REVIEW BY THE STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

AND

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA

The petition of the State of Louisiana, thought the Department of Transportation and Development, ("DOTD") and National Union Fire Insurance Company of Pittsburgh, Pennsylvania defendants and applicants in this matter, respectfully represent and show that:

1.

Applicants are aggrieved by the judgment of the Court of Appeal, First Circuit, in which matter DOTD and National Union were applicants to an application for a writ of certiorari or review taken on their behalf from the judgment of the Honorable J. Michael McDonald, Judge presiding, 19th Judicial District Court, Parish of East Baton Rouge, Div. H, granting plaintiffs' joint motion *in limine* to exclude the testimony of Gary H. Wimbish, Ph.D. ("Wimbish") and Thomas L. Kurt, M.D. ("Kurt") and the evidence of the marijuana rests at the trial on the merits and granting plaintiffs' joint motion for summary judgment, which dismissed defendants' affirmative defense that Kenny Clark, plaintiff, was driving under the influence of marijuana.

2.

Applicant shows that the following considerations under Section 19(a) of Rule X are present in this case and justify review by this Court:

(a) This case involves an erroneous interpretation and application of the laws of the State of Louisiana. This erroneous interpretation will cause material injustice

to the applicant herein and adversely affect the public interest.

(b) This case involves an erroneous interpretation and application of the Constitution and laws of the United States of America. This erroneous interpretation will cause material injustice to the applicant herein and adversely affect the public interest.

3.

Applicants attach to this applicator all of the pleadings, documents, and attachments required by Rule X of this Court and respectfully requests the Court to review this matter under the supervisory jurisdiction of the Court.

* * *

On January 17, 2001, defendants filed a writ application with the Court of Appeal, First Circuit requesting expedited consideration of the writ application and a stay of the trial. The writ application was denied on January 31, 2001.

DOTD and National Union now seek relief from this honorable court reversing the trial court's judgment granting plaintiffs' joint motion *in limine* to exclude the testimony of Wimbish and Kurt and the evidence of the marijuana test at the trial on the merits and granting

plaintiffs' joint motion for summary judgment, which dismissed defendants' affirmative defense that Clark was driving under the influence of marijuana, priority consideration, and stay of the trial.

ISSUES AND QUESTIONS OF LAW PRESENTED FOR DETERMINATION

1. Does the trial court's gatekeeping function pursuant to **Daubert** and its progeny include the trier of facts' domain as it relates to the weight, probative value, and credibility determinations?

2. Should the trial court's gatekeeping function pursuant to **Daubert** be more stringent when analyzing highly prejudicial evidence such as marijuana use in a tort action arising out of a motor vehicle accident?

3. Did the trial court abuse its discretion in granting plaintiffs' joint motion *in limine* to exclude the testimony of Wimbish and Kurt and the evidence of the marijuana tests at the trial on the merits?

4. Did the trial court err in granting plaintiffs' joint motion for summary judgment on defendants' affirmative defense of driving under the influence of marijuana?

5. Did the trial court's order excluding all evidence of marijuana use by Clark violate preemption provisions of the federal motor carrier safety laws and the laws of the State of Louisiana on drug use by commercial drivers?

ASSIGNMENTS OF ERRORS

1. The trial court abused its discretion in granting plaintiffs' joint motion *in limine* to exclude the testimony of Wimbish and Kurt and the evidence of the marijuana tests at the trial on the merits.

* * *

EVIDENCE BALANCING TEST

In their **Daubert** motion, plaintiffs also requested exclusion of all marijuana evidence. Plaintiffs argued that the prejudicial nature of the evidence outweighed its probative value. As stated above, when exercising its gatekeeping authority, the trial court should not consider the nature or prejudicial effect, if any, of certain evidence, about which an expert testifies. However, the trial court herein broadened the scope of its gatekeeping authority and excluded the testimony regarding Clark's marijuana use.

Kenny Clark's positive urine tests for marijuana and the opinions of Kurt and Wimbish have the tendency to make the existence of a fact, i.e. driver impairment, the cause of Clark's accident, more probable than without the evidence. **LSA-C.E. 401**. Clark's marijuana use, his speeding, and his lack of experience are all facts prejudicial to the plaintiffs; however, these facts are more relevant than prejudicial in this instance. From the scientific tests and the nature of the accident, defendants are able to show that Clark was impaired. Additionally, as a holder of CDL learner's permit, Clark is prohibited by both federal and state law from operating a commercial motor vehicle after he uses a controlled substance or a detectable amount of a controlled substance is present in his urine. **49 C.F.R. § 382.213** and **LSA-R.S. 32:414.2(B)(1)(a)**. Any

prejudicial effect this evidence may have is out weighed by the interests of the Department of Transportation ("DOT") and the Louisiana legislature in protecting the public from commercial drivers who drive under the influence of controlled substances and or who use controlled substances.. As a commercial driver, Clark's marijuana use renders him an unfit driver. Because Clark was operating a commercial motor vehicle, evidence of his marijuana use is more probative than such evidence would be in the case of any ordinary motorist operating an automobile; therefore, this evidence is admissible under the **LSA-C.E. art 401 and 403** balancing test.

ARGUMENT ON ASSIGNMENTS OF ERROR NO. 2

Plaintiffs joint motion for summary judgment on defendants' affirmative defense that Clark was driving under the influence of marijuana is predicated on the granting of plaintiffs' joint motion *in limine* to exclude the testimony of Gary H. Wimbish, Ph.D. and Thomas L. Kurt, M.D. at the trial on the merits. As stated above, the court's **Daubert** ruling was incorrect. "Appellate courts review summary judgments de novo under the same criteria that govern the trial judge's consideration of

* * *

> "(a) This part applies to every person and to all employers of such persons who operate a commercial motor vehicle in commerce in any State, and is subject to:
>
> "(I) The commercial driver's license requirements of part 383 of this subchapter."

Clark was issued a leaner's permit from the state of Arizona pursuant to **49 C.F.R. § 383.23(c)**.

49 C.F.R. § 383.107 provides the definitions of a commercial motor vehicle and a driver. The 80,000 pound tractor trailer hauling property (cattle) qualifies as a commercial motor vehicle, and Clark is considered a driver pursuant to the definition provided in this section. Additionally, **49 C.F.R. § 383.107** provides the definition of a safety-sensitive function:

> "All time from the time a driver begins work or is required to be in readiness to work until the time he/she is relieved from work and all responsibility for performing work. Safety-sensitive functions shall include:
>
> (3) All time spent at the driving controls of a commercial motor vehicle in operation; and
>
> (4) All time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth (a berth conforming to the requirements of **§ 393.76** of this subchapter)."

The DOT enacted these substantial regulations for the sole purpose of reducing accidents and injuries involving commercial motor vehicles and their drivers, as is evidenced by:

49 C.F.R. § 382.101 which provides:

> "The purpose of this part is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or ***use of controlled dangerous substances by drivers of commercial motor vehicles***." (Emphasis added).

In furtherance of this purpose, the DOT has also enacted the following provisions which establish the duty of a driver of commercial motor vehicle vis a vis a controlled dangerous substance:

49 C.F.R. § 382.213 provides that:

> "(a) No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver ***uses*** any controlled substance, . . . "

49 C.F.R. § 382.215 further provides that:

> "No driver shall report for duty or remain on duty or perform a safety-sensitive function, if the driver tests positive for controlled substances."

The EMIT tests from Baton Rouge General Hospital, Dynacare, and the Crime Lab, along with the GC/MS confirmation performed by the Crime Lab, prove that Clark reported for and remained on duty, performing a safety-sensitive function (driving a commercial motor vehicle and being aboard a commercial motor vehicle) after he had used a controlled substance, marijuana.

49 C.F.R. § 382.501 provides that:

> "(a) Except as provided in subpart F of this part, no driver shall perform safety sensitive functions, including driving a commercial motor vehicle, if the driver has engaged in conduct prohibited by subpart B of this part . . . "

From the evidence presented at the hearing, the trial court found that Clark had used marijuana and that marijuana

metabolites were in his system at the time of the accident. **49 C.F.R. § 382.109** provides that:

> "(a) Except as provided in paragraph (b) of this section, this part preempts any state or local law, rule, regulation, or ***order*** to the extent that:
>
> (1) Compliance with both state or local requirements and this part is not possible; or
>
> (2) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in this part."

The trial court's order excluding the evidence that Clark had used marijuana after reporting for duty and remaining on duty is in contravention of **49 C.F.R. § 382.213** and **49 C.F.R. § 382.215**. One cannot reconcile DOT's no tolerance prohibition and the trial court's order; therefore, the order of the trial court is preempted, and the evidence of Clark's marijuana use should be admissible at trial. As a matter of public policy both the federal and state government have decided legislatively that the use of a controlled dangerous substance by a CDL holder is tantamount to impairment. Drug use is widely recognized as unsafe by a CDL holder.

This statutory scheme enacted by the DOT is similar to that enacted by the Louisiana Legislature. **LSA-R.S. 32:414.2 B(1)(a)** provides in pertinent part:

> "Notwithstanding any other law to the contrary, or Subsection A of this Section, an operator of a commercial motor vehicle shall not have any measured alcohol concentration ***or any detected presence of alcohol or a controlled dangerous substance while operating or taking***

part in operating, or in physical control of, a commercial motor vehicle.

The Louisiana legislature has also enacted a zero tolerance approach to controlled substance use by commercial drivers; any detectable presence of a controlled dangerous substance in a driver while operating a commercial motor vehicle is a violation of the law which results in a license suspension. The importance of this in Louisiana is evident by the language that the above cited section takes precedence over any other law.

* * *

COURT OF APPEAL

FIRST CIRCUIT

THE STATE OF LOUISIANA

DOCKET NO. 2001-CA-2668 C/W 2001-CA-2669

****

GORDEAN ADELLA WINGFIELD, INDIVIDUALLY AND AS GUARDIAN AND CONSERVATOR OF THE ESTATE OF HER MINOR SON, KENNY CLARK

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT AND WILSON TRAILER COMPANY, INC.

CONSOLIDATED WITH

JACKIE MURRAY, SHARON ROY ROVNER, IVY J. WILLS AS LEGAL GUARDIAN AND ATTORNEY FOR JOSEPH EDWARD WINGFIELD, AND JOSEPH EDWARD WINGFIELD INDIVIDUALLY

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, WILSON TRAILER COMPANY, INC.

HONORABLE J. MICHAEL MCDONALD
19TH JUDICIAL DISTRICT COURT PARISH OF EAST BATON ROUGE
DIV. H, DOCKET NO. 418,074 c/w 418,842

****

THIS CASE COMES BEFORE THIS COURT ON CIVIL APPEAL

ORIGINAL BRIEF BY THE STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF

TRANSPORTATION AND DEVELOPMENT, DEFENDANT, APPELLANT

****

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THROUGH THE DEPARTMENT
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DEVELOPMENT
DEFENDANT/APPELLANT

* * *

JURISDICTION

Jurisdiction is vested in this court pursuant to Article 5, Section 10 of the Louisiana Constitution of 1974 and **LSA-C.C.P. art. 2201**.

ASSIGNMENT OF ERRORS

1. The trial court erred in denying DOTD's motion for summary judgment on federal preemption.

2. The trial court erred as a matter of law in not finding that federal law preempts Louisiana state tort law because the U.S. Congress has occupied the field of design, construction, maintenance, and signage on the Interstate Highway System and Louisiana state tort

law conflicts with federal law on design, construction, maintenance, and signage on the Interstate Highway System, making compliance with both federal and state regulations a physical impossibility; and Louisiana tort law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

3. The trial court abused its discretion in granting plaintiffs' joint motion *in limine* to exclude the testimonies of Gary H. Wimbish, Ph.D. ("Wimbish"), and Thomas L. Kurt, M.D. ("Kurt"), and the evidence of the marijuana tests at the trial on the merits, warranting a *de novo* review of the record.

4. The trial court's order excluding all evidence of marijuana use by Clark violates preemptive provisions of the federal motor carrier safety laws and the laws of the State of Louisiana on drug use by commercial drivers, warranting a *de novo* review of the record.

5. The trial court erred in granting plaintiffs' joint motion for summary judgment on defendants' affirmative defense of driving under the influence of marijuana.

6. The trial court erred in excluding two (2) tickets received by Kenny Clark prior to the date of the accident after plaintiffs were allowed to present evidence of Clark's driving history prior to the accident.

7. The trial court erred as a matter of law in allowing Michael Gillen ("Gillen"), the investigating officer for the Baton Rouge City Police, to give opinion testimony on the cause of the accident as he did not witness the accident, and his testimony was not helpful to a clear understanding of the cause of the accident, warranting a *de novo* review of the record.

8. The trial court erred as a matter of law in allowing Michael Gillen, the investigating officer for the Baton Rouge City Police, to give opinion testimony on the cause of the accident due to the fact that his testimony was biased because at the time of trial Giller had been retained by counsel for the plaintiffs as an expert in other cases, warranting a *de novo* review of the record.

9. The trial court erred as a matter of law in allowing plaintiffs' expert in roadway design, Maurice Bronstad, Ph.D. ("Bronstad"), to testify to the design

* * *

Because the trial court's **Daubert** ruling was based upon the court's conclusion that Clark was not impaired at the time of the accident, Kurt's and Wimbish's opinion testimony in their depositions was wrongly excluded as opposition to plaintiffs' motion for summary judgment on DOTD's affirmative defense of Clark's impairment by marijuana use and plaintiffs' motion should have been denied. ***Independent Fire Ins. Co. v. Sunbeam Corp.***, (99-2181 La. 2/29/00, 99-2257 La. 2/29/00), 755 So.2d 235-755 So.2d 226, 236.

Even assuming the trial court's granting of plaintiffs' motion *in limine* and motion for summary judgment is correct, the order of the trial court is nevertheless pre-empted by federal law; thus, evidence of the presence of marijuana in Clark's urine should be admitted at trial. The order of the trial court excluding all evidence of

Clark's marijuana use is in direct conflict with the federal regulations involving CDL drivers and their use of controlled substances. These regulations sanction a CDL holder who uses marijuana while performing safety sensitive functions **49 C.F.R. § 382.103**. Clark was issued a leaner's permit from the state of Arizona pursuant to **49 C.F.R. § 383.23(c)**. The 80,000 pound double-deck tractor trailer loaded with cattle qualifies as a commercial motor vehicle, **49 C.F.R. § 383.107**, and Clark is considered a driver pursuant to the definition provided in this section. Additionally, "safety-sensitive functions shall include all time spent at the driving controls of a commercial motor vehicle in operation; and all time, other than driving time, in or upon any commercial motor vehicle." **C.F.R. § 383.107**.

The DOT enacted substantial regulations for the sole purpose of reducing accidents and injuries involving use of controlled dangerous substances by commercial drivers. **49 C.F.R. § 382.101**. In furtherance of this purpose, the DOT has also enacted the following provisions which establish that a driver of a commercial motor vehicle shall not report or remain on duty or perform safety sensitive functions when he uses a controlled dangerous substance **49 C.F.R. § 382.213** and **49 C.F.R. § 382.215**.

The EMIT tests from Baton Rouge General Hospital, Dynacare, and the Crime Lab, along with the GC/MS confirmation performed by the Crime Lab, prove that Clark reported for, and remained on, duty, performing a safety-sensitive function (driving a commercial motor vehicle and being aboard a commercial motor vehicle) after he had used a controlled substance, marijuana. The federal regulations clearly prohibit drivers from

performing safety-sensitive functions if they use a controlled dangerous substance; **49 C.F.R. § 382.501**.

From the evidence presented at the hearing, the trial court found that Clark had used marijuana and that marijuana metabolites were in his system at the time of the accident. Therefore, Louisiana rules of evidence are preempted by **49 C.F.R. § 382.109**. The trial court's order excluding the evidence that Clark had used marijuana after reporting for duty and remaining on duty is in contravention of **49 C.F.R. § 382.213** and **49 C.F.R. § 382.215**.

This statutory scheme enacted by the DOT is similar to that enacted by the Louisiana Legislature. **LSA-R.S. 32:414.2 B(1)(a)**.[4]

* * *

[4] "Notwithstanding any other law to the contrary or Subsection A of this Section, an operator of a commercial motor vehicle shall not have any measured alcohol concentration or any detected presence of alcohol or a controlled dangerous substance while operating or taking part in operating or in physical control of, a commercial motor vehicle."

COURT OF APPEAL

FIRST CIRCUIT

THE STATE OF LOUISIANA

DOCKET NO. 2001-CA-2668 C/W 2001-CA-2669

****

GORDEAN ADELLA WINGFIELD, INDIVIDUALLY AND AS GUARDIAN AND CONSERVATOR OF THE ESTATE OF HER MINOR SON, KENNY CLARK

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT AND WILSON TRAILER COMPANY, INC.

CONSOLIDATED WITH

JACKIE MURRAY, SHARON ROY ROVNER, IVY J. WILLS AS LEGAL GUARDIAN AND ATTORNEY FOR JOSEPH EDWARD WINGFIELD, AND JOSEPH EDWARD WINGFIELD INDIVIDUALLY

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, WILSON TRAILER COMPANY, INC.

HONORABLE J. MICHAEL MCDONALD
19TH JUDICIAL DISTRICT COURT PARISH
OF EAST BATON ROUGE
DIV. H, DOCKET NO. 418,074 c/w 418,842

****

APPLICATION FOR REHEARING EN BANC OR REHEARING BY THE STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, DEFENDANT, APPELLANT

****

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THROUGH THE DEPARTMENT
OF TRANSPORTATION AND
DEVELOPMENT
DEFENDANT/APPELLANT

NOW INTO COURT, through undersigned counsel comes the State of Louisiana, through the Department of Transportation and Development ("DOTD"), who moves this honorable court for a rehearing en banc or, in the alternative, a rehearing on the opinion of this court rendered on November 8, 2002, for the following reasons to wit:

1.

The trial court's error of excluding the evidence of marijuana use and Kenny Clark's ("Clark"), plaintiff, impairment by the trial court was not harmless error, as this honorable court held, and this evidence would have

changed the jury's verdict pertaining to the fault of DOTD or, in the least, changed the jury's verdict concerning the allocation of fault among Clark and DOTD.

2.

This honorable court's conclusion that the trial court's exclusion of the evidence of marijuana use and Clark's impairment by the trial court was not prejudicial error should be reheard and reconsidered because the court's ruling does not promote and, in fact, stands as an obstacle to the zero-tolerance approach adopted by the federal and state governments regarding commercial drivers and their use of controlled, dangerous substances such as marijuana.

3.

Once this court determined that the trial court was in error when it excluded the marijuana evidence and evidence of Clark's impairment at trial, it erred when it reviewed the excluded evidence in isolation from all of the other evidence introduced at trial, when, considered along with the other evidence, the marijuana evidence could easily form the basis for a reasonable conclusion of impairment on the part of Clark.

4.

This honorable court's decision finding that Federal Air Highway Act does not preempt state tort law is in error because I-10 is part of the Dwight D. Eisenhower

* * *

IN THE SUPREME COURT
STATE OF LOUISIANA

DOCKET NO. 03C0339

****

GORDEAN ADELLA WINGFIELD, INDIVIDUALLY AND AS GUARDIAN AND CONSERVATOR OF THE ESTATE OF HER MINOR SON, KENNY CLARK

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, ET AL

CONSOLIDATED WITH

JACKIE MURRAY, SHARON ROY ROVNER, IVY J. WILLS AS LEGAL GUARDIAN AND ATTORNEY FOR JOSEPH EDWARD WINGFIELD, AND JOSEPH EDWARD WINGFIELD INDIVIDUALLY

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, ET AL

HONORABLE J. MICHAEL MCDONALD
19TH JUDICIAL DISTRICT COURT PARISH OF EAST BATON ROUGE
DIV. H, DOCKET NO. 418,074 c/w 418,842

COURT OF APPEAL, FIRST CIRCUIT DOCKET NO. 2001 CA 2668 c/w 2001 CA 2669

****

APPLICATION FOR SUPERVISORY WRITS AND RELIEF BY THE STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, DEFENDANT/APPLICANT, DIRECTED

TO THE SUPREME COURT OF THE STATE OF LOUISIANA

****

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* * *

TO THE HONORABLE, THE SUPREME COURT OF THE STATE OF LOUISIANA:

APPLICATION FOR WRIT OF CERTIORARI OR REVIEW BY THE STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

The petition of the State of Louisiana, thought the Department of Transportation and Development ("DOTD"), defendant and applicant in this matter, respectfully represents and shows that:

1.

Applicant is aggrieved by the opinion of the Court of Appeal, First Circuit, State of Louisiana, rendered on

November 8, 2002, in which matter applicant was an appellant in a suspensive appeal, and respondent to an answer to its appeal on behalf of the Wingfield, et als, plaintiffs, and Jackie Murray, et als, plaintiffs, from a judgment pursuant to a jury verdict in the 19th Judicial District Court for the Parish of East Baton Rouge, Louisiana, Docket No. 418,074 c/w 418,842, Division "H", Honorable J. Michel McDonald, Judge presiding, finding DOTD 54% at fault, and finding Kenny Clark ("Clark") 46% at fault.

2.

Applicant shows that the following considerations under Section 1(a) of Rule X are present in this case and justify review by this Court:

(a) The opinion of the First Circuit conflicts with the decisions of the United States Supreme Court as it concerns the Federal Aid Highway Act's preemption of state tort law.

(b) The opinion of the First Circuit conflicts with decisions of this court and other courts of appeal opinions concerning the First Circuit's ruling on the proper admission of evidence, what constitutes reversible error requiring a *de novo* review of the entire record when evidentiary and jury instruction errors occur, the finding of fault on DOTD, and the allocation of fault between DOTD and Clark.

(c) The First Circuit has decided and sanctioned a lower court's ruling on the issues of the Federal Aid Highway Act's preemption

of state tort law, the application of Louisiana and federal law regarding marijuana use by a commercial driver in tort suits, and the validity of out state marriages for the purposes of instituting a wrongful death action.

(d) This case involves an erroneous interpretation and application of the constitution and laws of the United States as it concerns the Federal Aid Highway Act's preemption of state tort law, and the application of the Federal Motor Carrier Regulation's zero tolerance of a commercial driver's use of controlled dangerous substances in tort law cases. This erroneous interpretation will cause material injustice to the applicant herein and adversely affect the public interest.

(e) This case involves an erroneous interpretation and application of the constitution and laws of the State of Louisiana as it concerns whether evidentiary errors and errors regarding jury instructions constitute reversible error requiring a *de novo* review, appellate review of mixed questions of law and fact and the finding of fault on DOTD, and the duty to be considered when evaluating the conduct of a professional driver. This erroneous interpretation will cause material injustice to the applicant herein and adversely affect the public interest.

(f) When the First Circuit conducted a limited *de novo* review of the record concerning the issue of marijuana use by Clark to determine it was not reversible error; it departed from proper appellate procedure.

ASSIGNMENTS OF ERROR

1. The trial court erred in denying DOTD's motion for summary judgment on federal preemption.

2. The court of appeal erred in finding that Wimbish's quantification of the amount of Carboxy-THC in Clark's blood was properly excluded.

3. The court of appeal erred in finding that the trial court's exclusion of the testimony of Wimbish and Kurt and the evidence of the marijuana tests at the trial on the merits was harmless error and did not warrant a *de novo* review of the record.

4. The court of appeal erred as a matter of law in conducting a limited *de novo* review of the testimonies of Wimbish and Kurt and the evidence of the marijuana tests which was excluded at the trial.

* * *

The order of the trial court excluding all evidence of Clark's marijuana use and the court of appeal opinion is in direct conflict with the federal regulations involving CDL drivers and their use of controlled substances. The DOT enacted substantial regulations for the sole purpose of reducing accidents and injuries involving use of controlled dangerous substances by commercial drivers. **49 C.F.R. § 382.101**. In furtherance of this purpose, the DOT has also enacted the following provisions which establish that a driver of a commercial motor vehicle shall not report or remain on duty or perform safety sensitive functions when he uses a controlled dangerous substance: **49 C.F.R. § 382.213** and **49 C.F.R. § 382.215**.

This statutory scheme enacted by the DOT is similar to that enacted by the Louisiana Legislature. **LSA-R.S. 32:414.2 B(1)(a).**[3] The Louisiana legislature has also enacted a zero tolerance approach to controlled substance use by commercial drivers; any detectable presence of a controlled dangerous substance in a driver while operating a commercial motor vehicle is a violation of the law which results in a license suspension. The court of appeal's opinion ignores the policy of the federal government and of Louisiana and assures no consequences for commercial drivers who use marijuana. DOTD submits that this court must take action to uphold the solemn expression of legislative will because if it does not, then the above legislation will have no practical effect.

* * *

[3] "Notwithstanding any other law to the contrary or Subsection A of this Section, an operator of a commercial motor vehicle shall not have any measured alcohol concentration or any detected presence of alcohol or a controlled dangerous substance while operating or taking part in operating, or in physical control of, a commercial motor vehicle."